Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Michael E. Haglund
Counsel of Record
HAGLUND, KIRTLEY,
KELLEY & HORNGREN, LLP
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

March 1999

18 pp

QUESTIONS PRESENTED

1. Does the National Environmental Policy Act compel an agency to expand the scope of proposed actions in an environmental assessment to include every reasonably foreseeable and contemplated action?

2. What level of detail must an environmental assessment contain relative to an environmental impact statement under the National Environmental Policy Act?

PARTIES TO THE PROCEEDING

Petitioner, Ochoco Lumber Company doing business as Malheur Lumber Company, is an Oregon limited partnership. D.R. Johnson Lumber Company doing business as Prairie Wood Products is an Oregon corporation that has no parent or subsidiaries. Malheur Timber Operators and Northwest Forest Resource Council are Oregon nonprofit corporations that have no parent or subsidiaries.

Jeff Blackwood is the Forest Supervisor of the Umatilla National Forest, and the United States Forest Service is an agency of the United States Department of Agriculture.

Petitioners are not fully aware of the organizational status of respondents, but to the best of petitioner's knowledge, respondent Blue Mountains Biodiversity Project is a "project" of the League of Wilderness Defenders. Respondent Blue Mountain Native Forest Alliance is an alliance of environmental groups in eastern Oregon and southeast Washington. The Alliance is an inactive non-profit Oregon corporation whose corporate status expired in 1996 for failure to renew. Respondent Society Advocating Natural Ecosystems is an Oregon active assumed business name of four individuals. The Cascadia Fire Ecology Education Project has no corporate status and conducts educational hikes for the public.

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BLUE MOUNTAINS BIODIVERSITY
PROJECT, et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit

Petitioner Malheur Lumber Company, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Court of Appeals opinion is reported at 161 F.3d 1208 (9th Cir. 1998) and is reprinted in petitioner's appendix at page A-1. The following Ninth Circuit orders are also contained in the appendix:

Order denying the emergency motion for injunction pending appeal. A-104.

Order granting an injunction following oral argument. A-106.

Order of clarification. A-108.

Second order of clarification. A-110.

The district court opinion is unreported and is set forth in the appendix at A-21. The following district court orders are also contained in the appendix:

Order granting summary judgment for defendants. A-99.

Order denying motion for injunction pending appeal. A-101.

JURISDICTION

The Court of Appeals filed its opinion on December 2, 1998. This writ is filed within 90 days after December 2, 1998 and is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The statute involved in this case is the National Environmental Policy Act of 1969, 43 U.S.C. § 4331 *et seq.* Also at issue are the statute's implementing regulations, 40 C.F.R. §§ 1500-1508.

STATEMENT OF THE CASE

Sometimes when lightening strikes it ignites more than trees. In this case, it ignited a public controversy of no less intensity but much longer duration than a wildfire.

In the summer of 1996, a lightening storm struck national forests in eastern Oregon. The resulting catastrophic Tower Fire raged out of control for nearly a month. The inferno torched approximately 51,000 acres, and, in some areas, consumed everything in its path.

While the fire still burned, Forest Service personnel began planning for the area's rehabilitation. Although the fires have long since been squelched, the resulting controversy over how to rehabilitate the devastated terrain continues to rage.

This case presents questions regarding the scope and detail of environmental analysis required by the National Environmental Policy Act ("NEPA"). Although these questions arise in the context of rehabilitating a vast area burned by wildfire, the scope and detail of environmental analysis is of concern to every federal agency that must prepare environmental assessment and impact statements.

The scope of environmental analysis issue involves whether the Forest Service must propose all fire salvage and rehabilitation measures simultaneously, or whether it can limit its proposal to the most severely burned area which is in greatest need of tree planting, erosion control, and timber salvage. The Forest Service used the latter, more focused approach in approving the Big Tower Salvage and Revegetation Project environmental assessment for timber salvage and rehabilitation on 4,200 of the most severely burned acres in the 51,000 acre Big Tower fire. The area targeted for salvage and rehabilitation was the high intensity burn area, where 90% or more of the trees were dead and the ground cover had been consumed. A-24.

The Forest Service contemplated additional salvage and rehabilitation projects in the less severely burned areas, but only one project had evolved to a concrete proposal at the time the Big Tower Environmental Assessment ("EA") was prepared and approved. A-34. This proposal, the 1996 Roadside Salvage, was accounted for in the Big Tower EA. Although the Big Tower Salvage and Revegetation Project area was limited to less than 10% of the area burned by the fire, the analysis of environmental effects of the Project extended to and beyond the 51,000 acre area to comprehensively evaluate mobile resources such as fish, wildlife, and soil. A-40 to A-41, A-76 to A-83.

The district court endorsed the timing choice of the Forest Service. It concluded that the agency had a rational basis for not developing all contemplated actions into proposals simultaneously, given the urgent need to prevent soil erosion through revegetation and to avoid further economic loss of deteriorating trees. A-61 to A-62.

The Ninth Circuit rejected the district court's reasoning and held that NEPA mandated the Forest Service to include every project that might occur on the entire 51,000 acre burn as a proposal in an EIS, even if the project was only contemplated. A-16 to A-18.

The detail of environmental analysis required in an EA also is at issue. Relative to environmental impact statements ("EISs"), EAs are more concise and less detailed. The reason for the distinction is that the two types of documents serve different purposes under NEPA, which is a procedural statute designed to protect our nation's resources by ensuring that federal agencies adequately evaluate the environmental consequences of proposed actions. An EA guides an agency in deciding whether the time, money and energy involved in preparing an EIS is warranted. This is a particularly important consideration where, as here, an agency is responding to a devastating wildfire that wreaked environmental havoc across an ecosystem.

The Forest Service evaluated erosion and sedimentation in an interdisciplinary ecosystem report, the Tower Fire Ecosystem Analysis, which the EA incorporated by reference. A-29, A-70 to A-71. The Analysis mapped the entire 51,000 acre fire area by soil type, burn intensity, and erosion potential. A-71. Because quantitative sedimentation data was not available, the Forest Service tried to gauge erosion using in-stream sediment boxes, although the efforts were unsuccessful because of heavy sediment generated by the fire. A-71. The Forest Service collected extensive information on logging, including the miles of logging road construction, the number of acres to be harvested by logging system, and the erosion potential on those acres. A-91 to A-92. Specific harvest and transportation plans were provided

to the interdisciplinary team for analysis of environmental effects. A-90, A-92.

After exhaustively analyzing the Big Tower EA and its supporting administrative record, the district court found that sufficient information supported the Forest Service's decision to proceed with the Big Tower Salvage and Revegetation Project without preparing an EIS.[1] See generally A-21 to A-98.

The Ninth Circuit held that the Big Tower EA was inadequate because it did not provide a quantitative sediment estimate nor specifically identify the location of proposed roads or the number of stream crossings. A-12 to A-14.

The basis for federal jurisdiction in the Court of Appeals was 28 U.S.C. § 1291. A-4.

REASONS FOR GRANTING THE WRIT

1. Post-wildfire Environmental Analysis is an Issue of Great Public Importance.

Western national forests are extremely susceptible to devastating wildfires because of deteriorating forest health and an abundance of dead and dying timber. Concerned that the problem had reached epidemic proportions, Congress in 1995 enacted the Emergency Salvage Timber Sale Program.

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[1] Unlike the district court, the Court of Appeals held that the Forest Service finding of no significant impact must be supported solely by the EA without reference to the administrative record. A-14.

Pub. L. No. 104-19 § 2001, 109 Stat. 194, 240 (1995).[2] To effectuate its goals, Congress exempted timber salvage sales from compliance with NEPA and other laws until the Emergency Program expired. Id. at § 2001(i), 109 Stat. 245-46.

The Emergency Program and its exemption from environmental laws expired in 1997, but the threat of large wildfires remains. See Upper Columbia River Basin Draft Environmental Impact Statement, Vol. 1, Chap. 2, p. 45-50. Because large wildfires pose a far different planning and environmental analysis problem than conventional implementation of forest plans, the Forest Service and the courts would benefit greatly from clarification of NEPA requirements in the context of wildfires on public lands. Such clarification could obviate the need to set aside environmental laws as was done in the Emergency Salvage Timber Sale Program and enable the Forest Service to respond more rapidly when rehabilitating areas devastated by large wildfires.

2. The Decision is Contrary to Supreme Court Precedent.

The Ninth Circuit opinion requires that the Forest Service propose all conceivable actions in a vast area burned by a wildfire in the same environmental document, even if the actions are merely contemplated and have independent utility from the immediate proposed action. The decision is

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[2] The Conference managers emphasized that "the emergency forest health situation from fire, insect infestation, and disease has approached epidemic levels." H.R. CONF. REP. NO. 124, 104th Cong., 1st Sess. 134.

at odds with existing Supreme Court precedent and eliminates agency discretion by requiring that the Forest Service propose all projects for rehabilitation of a 51,000 acre fire area at once.

The fact that there are other "contemplated" rather than "proposed" actions does not rise to the level of significance requiring an EIS for rehabilitation of less than 10% of the area burned by fire. The Court has held that contemplated actions do not create "significance" requiring an EIS. Kleppe v. Sierra Club, 427 U.S. 390, 404 (1976)("[T]he mere 'contemplation' of certain action is not sufficient to require an impact statement.").

In Kleppe, plaintiffs argued that the Department of Interior had violated NEPA by not preparing an EIS for coal development in the Northern Great Plains Region, because the development was programmatically, geographically, and environmentally related. Id. at 412. Plaintiffs also claimed that an EIS was required because the coal projects would produce a wide variety of cumulative impacts throughout the Northern Great Plains Region. This Court held that the Department had not violated NEPA and emphasized that:

> determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.

Id. at 414. The Court concluded that a comprehensive EIS was not necessary, for:

> Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.

Id.

In this case, the rapid deterioration of trees in the most intensively-burned area of the fire was a "practical consideration of feasibility" that provided the rational basis for restricting the scope of the Big Tower EA. The EA excluded as proposals contemplated actions that were within the fire perimeter but outside the intensively-burned area. However, consistent with the Council on Environmental Quality ("CEQ") regulations, cumulative effects of the Project were thoroughly assessed. A-73 to A-83.

The CEQ regulations establish the scope of actions to be considered in an EIS and include connected actions, cumulative actions, and similar actions. 40 C.F.R. § 1508.25, A-120 to A-121. The Ninth Circuit concluded that an EIS is required if the actions are "reasonably foreseeable." A-17 to A-18. This sets a new standard that departs from the concrete proposal standard of NEPA and Kleppe. If all actions that are "reasonably foreseeable" must be fully developed as proposals in the environmental analysis, then the scope of the project becomes too broad for the agency to achieve its objectives.

The CEQ regulations give the agency discretion and state that an agency "may wish" to analyze "reasonably foreseeable" actions in the same EIS. The Ninth Circuit decision, in contrast, leaves the agency no choice, contrary to existing law. Instead, it compels the agency to develop all

reasonably foreseeable actions into proposals which, in turn, will require an EIS in every instance. Such a per se EIS rule is neither in the statute nor the regulations, but it fits well with the Circuit's insistence on a heightened degree of detail in EAs. If contemplated projects must be developed prematurely into proposals, the Forest Service never will have enough information to meet the exacting detail requirements imposed by the Ninth Circuit.

3. The Decision Obscures an Agency's Duty under NEPA.

This Court's guidance is needed to clarify an agency's duty under NEPA regarding the detail of environmental analysis required in an EA. NEPA, as its name implies, mandates a national environmental policy. 42 U.S.C. § 4331, A-112 to A-113. As such, NEPA must be implemented uniformly throughout the United States. Here, however, the Ninth Circuit blurred the line between EAs and EISs by imposing an unwarranted complexity requirement on the former. The Ninth Circuit's approach is at odds not only with NEPA and the CEQ regulations that guide federal agencies in implementing the Act, but it also is contrary to the approach taken by other Courts of Appeal that have addressed the issue. See, e.g., Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990); Sierra Club v. United States Forest Service, 46 F.3d 835, 840 (8th Cir. 1995). This Court should intervene to resolve the conflict generated by the Ninth Circuit's opinion on this important matter.

NEPA mandates the preparation of environmental documents to ensure that agencies engage in informed decisionmaking on matters that may affect the environment. Robertson v. Methow Valley Citizens Council, 490 U.S. 332,

349 (1989). Specifically, NEPA mandates the preparation of a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C), A-114. Neither NEPA nor the CEQ regulations dictate the type or amount of scientific information required in an EA, however.

The CEQ regulations guide agencies in determining whether an EIS is required for a proposed action. See generally 40 C.F.R. §§ 1500-08. If a proposed action neither normally requires an EIS nor is normally entitled to a categorical exclusion, then an agency must prepare an EA to determine whether an EIS is warranted. Id. § 1501.4, A-118. An EA functions as a triggering mechanism for further environmental study.

The CEQ regulations teach that an EA is a "concise" report that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." Id. § 1508.9, A-119 to A-120. Based on the EA, an agency either: (1) prepares a Finding of No Significant Impact ("FONSI"); or (2) prepares a detailed EIS. Id. § 1501.4, A-118 to A-119. The CEQ's definition of an EA thus contemplates a dichotomy in the level of detail required in an EA relative to an EIS. Further, in the event that an EIS is not triggered, the EA provides the basis for demonstrating that the agency took the requisite "hard look" at the potential environmental consequences of the proposed action. Methow Valley, 490 U.S. at 350 (quoting Kleppe, 427 U.S. at 410 n. 21). Nothing more is required nor expected of an EA.

In this case, the Ninth Circuit held that the Forest Service could not proceed without preparing an EIS because the Big Tower EA inadequately evaluated the proposed

action's effects on erosion and sediment delivery. A-12 to A-14. Apparently looking to the EA for a quantitative sediment estimate, and criticizing the Forest Service for a "fail[ure] to heed [the court's] warning" in an earlier case, the court stated that "'general statements about "possible" effects and "some risk"'" did not satisfy NEPA's "hard look" requirement. A-13. (citing Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998) (Fletcher, J.)).

Notably, Neighbors of Cuddy Mountain was a case in which the Ninth Circuit evaluated the sufficiency of an EIS and a Supplemental EIS. Unlike those documents, EAs are not meant to answer every question in detail but rather aim to ensure that an agency conducts a reasonably thorough analysis. The Ninth Circuit's approach thus calls for an unwarranted level of detail in a document that often is only a preliminary step on the way to further analysis. It also obliterates the CEQ's distinction between EAs and EISs, despite the fact that "CEQ regulations are entitled to substantial deference." Methow Valley, 490 U.S. at 1848 (citing Andrus v. Sierra Club, 442 U.S. 347 (1979)).

In addition to obliterating the distinction between EAs and EISs mandated by the statute and its implementing regulations, the Ninth Circuit opinion also is at odds with the approach taken by other Courts of Appeals. In the Seventh Circuit, for example, an EA is viewed as:

> a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement – which is very costly and time-consuming to prepare and has been

> the kiss of death to many a federal project – is necessary.

Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990). Accord Rhodes v. Johnson, 153 F.3d 785, 788 (7th Cir. 1998). The Eighth Circuit, relying on the CEQ's description of an EA as "a concise public document," similarly recognized that "[a]n EA cannot be both concise and brief and provide detailed answers for every question." Sierra Club v. United States Forest Service, 46 F.3d 835, 840 (8th Cir. 1995). Accord Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 809 (8th Cir. 1998). See also Fund for Animals, Inc. v. Rice, 85 F.3d 535, 546-47 (11th Cir. 1996) (distinguishing a "brief and concise" EA from a time-consuming and expensive EIS).

Although petitioners do not assert that an intercircuit conflict exists, they note that other Courts of Appeal give effect to the difference in the level of information required in an EA relative to an EIS. The Ninth Circuit's opinion thus creates confusion for federal agencies, such as the Forest Service, that are charged with managing natural resources for multiple uses while at the same time complying with a complicated regulatory web of environmental laws. By respecting the distinction between EAs and EISs, the above-cited cases recognize that the EA is an essential tool for modern federal agencies. Imposing an undue complexity requirement on a public document designed to aid federal agency decisionmaking in an era of burgeoning administrative demands would interfere with effective natural resources management. Contrary to the workings of NEPA, it would create the untenable situation where an agency would prepare a detailed document akin to an EIS for every proposed action. The Ninth Circuit's approach likely would bring the workings of federal agencies such as the Forest

Service to a screeching halt due to time, budgetary and energy constraints. As a result, our nation's resources – the very resources envisioned as benefitting from environmental statutes such as NEPA – would suffer.

CONCLUSION

Contrary to this Court's teaching in Kleppe, the Ninth Circuit has eliminated agency discretion to define the scope of its action in responding to large wildfires. The Ninth Circuit also has set a heightened standard for detail in an environmental assessment that does not conform to NEPA.

Petitioners respectfully request that the Court grant the petition for writ of certiorari.

Respectively submitted this 2nd day of March, 1999.

Michael E. Haglund
Counsel of Record

Scott W. Horngren
Julie A. Weis
Haglund, Kirtley, Kelley &
Horngren, LLP
101 SW Main Street
Suite 1800
Portland, OR 97204
Telephone: (503) 225-0777

Counsel for Petitioner

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Appendix to Petition for Writ of Certiorari
VOLUME 1 of 2
(A-1 to A-62)

Michael E. Haglund
Counsel of Record
HAGLUND, KIRTLEY, KELLEY & HORNGREN, LLP
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

March 1999

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APPENDIX INDEX

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2.	District Court Opinion August 24, 1998 (Beginning part in this volume, remainder in Volume 2).	A-21

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAINS BIODIVERSITY PROJECT; BLUE MOUNTAIN NATIVE FOREST ALLIANCE; SOCIETY ADVOCATING NATURAL ECOSYSTEMS; CASCADIA FIRE ECOLOGY EDUCATION PROJECT,	)
Plaintiffs-Appellants,	)
v.	)
JEFF BLACKWOOD, in his capacity as Supervisor, Umatilla National Forest; UNITED STATES FOREST SERVICE,	) No. 98-35783) D.C. No. CV-98-98-AA) OPINION
Defendants-Appellees.	) [Ninth Circuit Court of Appeals Filed Dec. 2, 1998]

MALHEUR LUMBER COMPANY; OCHOCO LUMBER COMPANY; PRAIRIE WOOD PRODUCTS; D.R. JOHNSON LUMBER CO.; MALHEUR TIMBER OPERATORS; NORTHWEST FOREST RESOURCE COUNCIL,

Intervenors-Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Ann Aiken, District Judge, Presiding

Argued and Submitted
November 3, 1998--San Francisco, California

Filed December 2, 1998

Before: Betty B. Fletcher and
A. Wallace Tashima, Circuit
Judges, and James M. Fitzgerald,*
District Judge.

Opinion by Judge Fletcher

* The Honorable James M. Fitzgerald, United States Senior District Judge, District of Alaska, sitting by designation

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COUNSEL

Marc D. Fink, Boise, Idaho, for the plaintiffs-appellants.

Michael K. Martin, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Scott W. Horngren, Portland, Oregon, for the intervenors-defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

We are called upon to determine whether the United States Forest Service ("Forest Service") could award a series of contracts for timber salvage sales in the Umatilla National Forest in eastern Oregon without preparing an Environmental

Impact Statement ("EIS") for the largest project and without evaluating the cumulative effects of multiple sales proposed in an area burned by a large wildfire. The Blue Mountains Biodiversity Project, Blue Mountain Native Forest Alliance, Society Advocating Natural Ecosystems, and Cascadia Fire Ecology Education Project (collectively "BMBP") contend that the Forest Service's decision to proceed using an Environmental Assessment instead of a more comprehensive EIS violated the National Environmental Policy Act. The district court denied plaintiffs' motion for summary judgment and permanent injunction and granted the Forest Service's cross- motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand with instructions that the Forest Service prepare an EIS.

FACTUAL AND PROCEDURAL BACKGROUND

The Umatilla National Forest, east of Ukiah, Oregon, includes a portion of the Blue Mountain Range that extends from northeastern Oregon to southeastern Washington. Within the National Forest's borders lies the John Day Basin, the only major river basin in Oregon that contains no dams; it also contains the North Fork of the John Day River, a designated Wild and Scenic River and home to the largest spawning population of summer steelhead and wild spring chinook salmon in the entire Columbia River system.

In August 1996, three wildfires swept through the North Fork John Day watershed. The largest of these fires, the "Tower Fire," engulfed 51,000 acres in a 10- by 14-mile swath. It was the largest wildfire in the recorded history of the Umatilla National Forest. The fire killed all trees, shrubs, and ground cover in several thousand acres. The remaining

acreage burned less intensely. In the end, however, the fire depleted stream shade along miles of streams, exposed soils to erosion, deposited sediment into waterways, killed fish, and destroyed fish and wildlife habitat. Over one half of the acres burned in the Tower Fire drain directly into the North Fork of the John Day River, and the remaining area drains into tributaries that eventually enter the river.

This litigation concerns the Forest Service's decision to conduct salvage logging on several thousand acres of burned forest land in the aftermath of the fire without preparing an EIS. Shortly after the fire, the Forest Service assessed the impacts of the fire on the watershed and developed a comprehensive fire recovery strategy. It identified five areas for timber salvage sales within the Tower Fire area. The Big Tower Salvage and Revegetation Project ("Big Tower" project), the largest project to emerge from the planning process, involved three separate timber sales encompassing 4,186 acres and revegetation efforts on an additional 4,500 acres.

The Forest Service estimated that the Big Tower sales would yield 30 million board feet and would remove all remaining trees within the high intensity burn area that were nine inches or greater at breast height[1]. Sixty-five percent of the acreage to be logged -- 2,720 acres -- contained soils with high erosion potential. Tractors would skid logs off 527 of these acres. The project would require eleven miles of new, temporary roads, and seven miles of reconstructed roads.

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[1] According to the timber purchaser, the actual sale quantity was 23 million board feet. The difference is immaterial to our decision.

After completing an Environmental Assessment ("EA") for the project in July 1997, the Forest Service issued a "Finding of No Significant Impact" on September 8, 1997, and declined to prepare an EIS. The Forest Service also amended the Umatilla National Forest Plan because the Big Tower project did not comply with Forest Plan Standards and Guidelines in certain management areas.

The Big Tower EA identified only one of the four other timber sales proposed for the Tower Fire area and contained no discussion of the total quantities of timber or total acreage proposed for logging in the multiple sales.[2] The EA also failed to identify the locations of any of the 18 miles of road proposed for construction or reconstruction, or the locations of any proposed stream crossings.

BMBP sought to enjoin the Big Tower salvage sales, alleging that the Forest Service failed to comply with the procedural requirements of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). Defendants-Intervenors are several logging companies including the company that was awarded the contracts for the salvage sales at issue.

BMBP and the Confederated Tribes of the Umatilla Indian Reservation appealed the Forest Service's decision on

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[2] The one referenced sale, the '96 Roadside Salvage," involved logging 6 million board feet on 63 miles of road in the Tower Fire area. An Administrative Appeals Officer reversed the Forest Service's decision on this project in October 1997. In November, 1997, the Forest Service scaled back this project to include only hazard tree removal along 58 miles of road. This new project, renamed the Hairy Hazard project, was categorically excluded from environmental review pursuant to 40 C.F.R. 1508.4.

September 8, 1997.[3] In December 1997, an Administrative Appeals Officer upheld the Forest Service's decision and BMBP appealed in January 1998. On July 24, 1998, the district court granted summary judgment in favor of the Forest Service and intervenors and denied BMBP's motion for summary judgment and permanent injunction. A panel of this court denied BMBP's emergency motion for an injunction pending appeal, but granted its motion for expedited hearing.

Logging began on the sales encompassing the Big Tower project in August 1998. On November 5, 1998, after hearing oral argument in this case, we enjoined all future logging, road building and other ground disturbing activities within the Tower Fire area of the Umatilla National Forest.[4] Post argument, defendants and intervenors advise that more than 80 percent of the timber in the Big Tower project has been cut and removed. Logging on one of the other sale areas, designed to remove hazard trees along the roads, has also begun. No logging has begun on the other projects identified in the Tower Fire area.

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[3] The Tribes have reserved treaty rights to hunt, fish, and graze on land within the Tower Fire Area. They are not parties to this appeal.

[4] On November 9, 1998, in response to defendants' request for clarification, we indicated that our injunction does not prohibit road maintenance, water bar installation, ditch and culvert cleaning, or other erosion prevention measures designed to protect the existing roads from winter erosion. The injunction also does not prohibit hunting or other recreational activities except in such areas and to such extent that the Forest Service determines, in its discretion, that defendants' and intervenors' logging activities have created erosion or erosion-inducing conditions that would be exacerbated by such activities.

STANDARD OF REVIEW

We review de novo the grant and denial of a district court's order granting and denying summary judgment. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). We must determine whether the Forest Service's decision was "based on a consideration of the relevant factors," or whether its actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)). In short, we must ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

Under this deferential standard, we must defer to an agency's decision that is "fully informed and well-considered." *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). However, we need not forgive a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989). "An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak*, 840 F.2d at 717.

ANALYSIS

1. NEPA Requirements for an Environmental Impact Statement

The National Environmental Policy Act ("NEPA") requires a federal agency such as the Forest Service to

prepare a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA "ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 1845 (1989).

A threshold question in a NEPA case is whether a proposed project will "significantly affect" the environment, thereby triggering the requirement for an EIS. 42 U.S.C. § 4332(2)(C). As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS. 40 C.F.R. § 1508.9. An EA is a "concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact." *Id.*

If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Save the Yaak*, 840 F.2d at 717. "The statement of reasons is crucial to determining whether the agency took a "hard look" at the potential environmental impact of a project." *Id.* BMBP argues that the Forest Service did not take the requisite "hard look " at the environmental impacts of the Big Tower Project or the cumulative effects of the Big Tower Project and other proposed timber salvage sales. We agree.

An EIS must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." *Idaho Sporting Congress*, 137 F.3d at 1149 (internal quotation omitted). Thus, to prevail on a claim that the Forest Service violated its statutory duty to prepare an EIS, a "plaintiff need not show that significant effects will in fact occur." *Id.* at 1150. It is enough for the plaintiff to raise "substantial questions whether a project may have a significant effect" on the environment. *Id.* We conclude that BMBP raised substantial questions about the environmental impacts of the Big Tower project alone and in combination with the other salvage sales proposed in the Tower Fire area.

We rely on NEPA regulations, promulgated by the Council on Environmental Quality ("CEQ"), to guide our review of an agency's determination of "significance." *See* 40 C.F.R. § 1508.27; *see also Marsh*, 490 U.S. at 372 (CEQ regulations entitled to substantial deference). To determine whether a proposed project will have "significant" impacts on the environment, an agency must evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial," and "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. §§ 1508.27(b)(4), (b)(5). [5] BMBP contends that the Forest Service failed to evaluate these factors. We discuss each in turn.

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[5] The regulations identify several other factors that must be analyzed, but plaintiffs only raise these factors on appeal, together with their argument that the cumulative impacts analysis is inadequate.

First, BMBP argues that the Forest Service failed to evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). We have held that "controversial" is "a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 1988). In *Sierra Club*, the Forest Service decided to award several timber contracts that contained groves of giant sequoia redwoods without preparing an EIS. *Sierra Club*, 843 F.2d at 1192. The Sierra Club produced evidence from numerous experts showing the EAs' inadequacies and casting serious doubt on the Forest Service's conclusions. We observed that "[t]his is precisely the type of "controversial" action for which an EIS must be prepared." *Id.* at 1193.

Here, BMBP argues that a substantial dispute exists concerning the likelihood and significance of adverse environmental effects from post-fire logging and road construction. BMBP points to an independent report on recommendations for ecologically sound post-fire salvage logging, known as the "Beschta report," prepared before the devastating 1996 fires, that recommends minimal intrusion into severely burned areas and no salvage logging in sensitive areas including severely burned areas and erosive sites. According to the Beschta report, there is no ecological need for immediate intervention in post-fire landscapes. A rapid response, the Beschta report explains, may result in unforeseen, detrimental environmental consequences. The Regional Forest Supervisor directed that the Beschta report recommendations be addressed in post-fire environmental

review documents, but the Forest Service failed to disclose the report's recommendations in the Big Tower EA.

We offer no opinion on whether the Forest Service's omission of any discussion of the Beschta report, alone, would discredit the Forest Service's decision not to prepare an EIS. We do note that its failure to discuss and consider the Beschta report's recommendations lends weight to BMBP's claim that the Forest Service did not take the requisite "hard look" at the environmental consequences of post-fire logging instead of letting nature do the healing. In any event, we focus on BMBP's arguments regarding the key issue of whether the uncertainty and unknown risks associated with this project require an EIS. *See id.*, at 1194.

A project may have significant environmental impacts where its effects are "highly uncertain or involve unique or unknown risks." 40 C.F.R. S 1508.27(b)(5). BMBP expressed concern that post-fire salvage logging generates increased sediment loading to the waterways that would cause irreparable damage to the salmon, steelhead, and bull trout populations of the North Fork John Day River, especially in light of the substantial increases in sediment caused by the fire. The Big Tower EA simply fails to persuade that no significant impacts would result from the Big Tower project. We find no documentation of the estimated sediment that would result from the logging and accompanying road building or the impacts of increased sediment on fisheries habitat. The Forest Service's only attempt to measure sedimentation failed when its data collection box overloaded with sediment.

Despite its lack of data, the Forest Service asserts throughout the EA that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire. Whether the increased erosion from logging and road building is smaller or larger than that produced by the fire is irrelevant. The proper evaluation should identify the impact of the increased sediment from the logging and roadbuilding on the fisheries habitat in light of the documented increases that already have resulted from the fire.

We have warned that "general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). The Forest Service failed to heed that warning. Even though the global EIS for the Umatilla National Forest Plan, as a whole (prepared several years before the fire) acknowledges that "[r]oad building . . . has long been recognized as having high risk for initiating short term soil movement and erosion into streams, and degrading water quality and instream habitat," the Big Tower EA never identifies the location of any of the proposed 18 miles of roads or the number of stream crossings, and reveals only that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire. The Umatilla National Forest Plan classifies about half of the area burned by the Tower Fire as a C7-Special Fish Management Area. The EA, however, merely acknowledges that "[c]oncern has been expressed" about the impact of sediment loading caused by post-fire salvage and road building on

salmon, steelhead, and bull trout populations in the North Fork John Day River system.

The EA's cursory and inconsistent treatment of sedimentation issues, alone, raises substantial questions about the project's effects on the environment and the unknown risks to the area's renowned fish populations. We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found. *See* 40 C.F.R. § 1508.9(a) (an environmental assessment is "a concise public document" that "briefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact").

We also find the discussion of mitigation measures inadequate. The EA identifies a series of Best Management Practices (BMPs) designed, in part, to reduce the erosion from the logging and roadbuilding activities of the Big Tower project. The Forest Service's reliance on these BMPs, however, is based on "past observations of logging on *unburned* areas" with similar soil types where BMPs have prevented "large increases" in erosion. We find nothing in the EA to support the Forest Service's conclusion that the proposed BMPs will be adequate in a severely burned area where increased levels of erosion have already occurred. We note that even before the fire water quality was suffering. One stream in the area failed to meet Oregon's water quality standards for temperature and another exhibited fish habitat impairment.

We also reject the Forest Service's argument that it need not prepare an EIS for the Big Tower project or any of the other proposed sales because these projects may be "tiered" to the Umatilla National Forest Plan EIS and to the other EAs pursuant to federal regulations. "Tiering refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28. Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.

Defendants rely on *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1422-24 (9th Cir. 1989), where we held that a Forest Service decision to log six million board feet of dead and insect-infested trees by cable and helicopter systems to avoid building a road into an unroaded portion of a forest did not require a supplemental EIS for the whole forest. They read *Lyng* too broadly. It does not support the proposition that any scale of logging project is exempt from a project-specific EIS simply because an EIS for a forest plan contemplates that logging may occur. In this case, the largest fire in the history of the Umatilla National Forest dramatically altered the forest ecosystem. The fire occurred several years after the EIS for the Forest Plan was prepared. The Forest Plan EIS does not, and could not, evaluate the impacts of this catastrophic fire, or the additional environmental impacts that large scale logging of severely burned areas could bring. We hold that the tiering regulations do not provide the release from the requirement of an EIS that the Forest Service urges.

2. Cumulative Impacts

We also conclude that the EA is inadequate in addressing the cumulative effects of the multiple salvage logging projects in the Tower Fire area together and in combination with the effects of the fire. A cumulative impact on the environment "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time. " *Id.* In determining whether a project will have a "significant" impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). If several actions have a cumulative environmental effect, "this consequence must be considered in an EIS." *Cuddy Mountain*, 137 F.3d at 1378 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990)).

As part of its Tower Fire recovery strategy, the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue in this appeal. Together, the sales would yield 40 - 55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes. No document explores the collective impact of these projects. Although the EA purports to rely on the Forest Service's "Tower Fire Ecosystem Analysis, " that study assessed only the impacts of the fire on the watershed not the additional impacts of logging several thousand acres and building several miles of roads. It does not substitute for

a meaningful cumulative impacts analysis of the actual logging projects.

BMBP alleges that the Big Tower EA fails to address, or even mention, three of the four other salvage sales proposed for the Tower Fire area. Relying on the Forest Service's own acknowledgment that the five sales are part of a coordnated Tower Fire recovery strategy, BMBP argues that the Forest Service should have evaluated the cumulative impacts of these sales in a single EIS. We agree.

"Significance cannot be avoided by . . . breaking [an action] down into small component parts." 40 C.F.R. § 1508.27(b)(7). We recognize that "the determination of the extent and effect of [cumulative impact] factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club* , 427 U.S. 390, 414, 96 S.Ct. 2718, 2732 (1976)(holding that the Department of the Interior did not need to complete a regionwide EIS for all potential mining projects in the Northern Great Plains area). We also recognize that "NEPA does not require the government to do the impractical." *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996). Here, however, all of the proposed sales were reasonably foreseeable. They were developed as part of a comprehensive forest recovery strategy. In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed.[6] At the very least,

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[6] What appears to be a decision by the Forest Service to make

(continued...)

these sales raise substantial questions that they will result in significant environmental impacts. A single EIS, therefore, was required to address the cumulative effects of these proposed sales. *Cuddy Mountain*, 137 F.2d at 1380.

Although we now impose the "snag" that the Forest Service feared but the law requires, the Forest Service has largely succeeded in its strategy. In the two and one-half months between the denial of plaintiffs' motion for injunction pending appeal and our injunction following oral argument, over half of the trees in the Big Tower project area have been cut and removed without the benefit of meaningful environmental analysis. Plaintiffs' appeal is not rendered moot, however, because trees remain standing in the Big Tower area and the Forest Service has not yet acted on its remaining proposed sales in the Tower Fire area. *See Kettle Range Conservation Group v. United States Bureau of Land Management*, 150 F.3d 1083 (9th Cir. 1998)(per curiam) (enjoining BLM from transferring the remaining 10 percent of land under a land exchange found in violation of NEPA

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[6](...continued)
identified timber sales in advance of the completion of the Big Tower EA raises serious questions. In its "Umatilla National Forest Fire Recovery Strategy and Timelines," dated December 1996, the Forest Service explained that its decision to "conduct separate NEPA analysis on subsequent projects...not only simplifies the NEPA analysis, but...also allows some projects to move forward if other projects get snagged in appeals and/or litigation." Expediency and prejudice in favor of logging over NEPA compliance and adequate concern for the environment also appear in a July 1997 letter from the acting Forest Supervisor to logging companies. After observing that "due to the unique fisheries and water quality values in the [Tower Fire area], it is envisioned that the area will be controversial," he noted that the Forest Service's strategy for forest recovery "emphasizes multiple, smaller scale project NEPA preparation to achieve quick success."

even where 90 percent of the land had already been transferred and logged by private parties in violation of NEPA).

Although the district court is to be commended for its close attention to the details of the piece-meal studies undertaken by the Forest Service, it erred in not directing its analysis to the overall purpose of NEPA and its requirement that an EIS be prepared under the circumstances of the major actions proposed in this case in the wake of the great fire. NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 471. An EIS is required of an agency in order that it explore, more thoroughly than an EA, the environmental consequences of a proposed action whenever "substantial questions are raised as to whether a project *may* cause significant [environmental] degradation." *Idaho Sporting Congress*, 137 F.3d at 1149. That is exactly the circumstances of this case.

Our decision does not jeopardize the Forest Service's ability to undertake emergency measures in the wake of a disaster. Here, the catastrophic fire burned in August of 1996. The logging began in August of 1998. The Forest Service had ample opportunity and an obligation to undertake a more searching environmental review or to propose activities on a much smaller scale. Although NEPA "does not mandate particular results," it does "prescribe the necessary process." *Methow Valley*, 490 U.S. at 350.

CONCLUSION

The Forest Service has failed to take the "hard look" at the effects of the proposed timber sales that NEPA requires. The Forest Service has not discharged its obligation to undertake a thorough environmental analysis before concluding that no significant environmental impact exists from salvage logging sales in the Tower Fire area. Although our review under the arbitrary and capricious standard is deferential, it does not condone a "clear error of judgment." *Marsh*, 490 U.S. at 378.

In this case, the Forest Service made a clear error of judgment in its decision to prepare only an EA for the Big Tower project and in its failure to analyze the combined effects of several salvage sales in the same watershed developed as part of a coordinated fire recovery strategy. Accordingly, we REVERSE and REMAND to the district court with directions that it remand to the Forest Service for further proceedings consistent with this opinion. The injunction issued by this Court on November 5, 1998, as clarified on November 9, 1998, shall remain in full force and effect until the Forest Service satisfies its NEPA obligations.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,	)	Civil No. 98-98-AA
Plaintiffs,	)	OPINION
v	)	
JEFF BLACKWOOD, et al.,	)	
Defendants	)	
and	)	
MALHEUR LUMBER COMPANY, et al.,	)	[District of Oregon Filed Aug. 24, 1998]
Intervenors-defendants.	)	

Jack K. Sterne, Jr.
Attorney at Law
P.O. Box 608
Camp Sherman, Oregon 97730
Attorney for Plaintiffs

Kristine Olson
United States Attorney
Thomas C. Lee
Owen L. Schmidt
Asst. United States Attorneys
888 S.W. Fifth Avenue, Suite 1000
Portland, Oregon 97204
Attorneys for Defendants

Scott W. Horngren
Attorney at Law
101 SW Main, Suite 1800
Portland, Oregon 97204
Attorneys for Intervenors-Defendants

AIKEN, JUDGE:

Plaintiffs bring this action challenging the decisions of Jeff Blackwood, Forest Supervisor of the Umatilla National Forest, and the United States Forest Service (USFS) to approve and proceed with the Big Tower Timber Sale on the North Fork John Day Ranger District of the Umatilla National Forest without first preparing an environmental impact statement (EIS). Plaintiffs allege that defendants' decisions violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. and its implementing regulations, 36 C.F.R. part 219, and the Administrative Procedures Act (APA), 5 U.S.C. § 551 et seq..

Plaintiffs seek: 1) a declaratory judgment and mandatory injunction requiring the defendants to comply with NEPA by preparing an EIS; 2) a permanent injunction

barring defendants from permitting logging, or otherwise proceeding with, the Big Tower Timber Sale until a legally adequate EIS is prepared; 3) a declaratory judgment that proceeding with the Big Tower Timber Sale is not in accordance with applicable law, is arbitrary and capricious agency action, violates NEPA, the CWA, the National Forest Management Act (NFMA), and the APA; and 4) a permanent injunction barring the defendants from permitting logging, or otherwise proceeding with, the Big Tower Salvage and Revegetation Project (Big Tower Project) until defendants can demonstrate adequate and full compliance with all mandatory applicable provisions of NEPA, the CWA, the NFMA, and the APA. Plaintiffs also seek costs and attorney's fees.

Before the court are plaintiffs' motion for summary judgment and permanent injunction (#32), plaintiffs' motion to to file an overlength brief (#33), defendants' motion for summary judgment (#40), and defendants-intervenors motion for summary judgment (#46).

I. FACTS

In August 1996, the Tower Fire ignited during a lightning storm, and was not controlled until September 9, 1996. (AR 1288). The Tower Fire burned approximately 51,000 acres, in a swath about 14 miles long and 10 miles wide in the North Fork John Day District, Umatilla National Forest. (AR 2480). About 5,900 acres burned at "high intensity" ("total absence of live tree crowns and total absence of ground vegetation, with little down wood debris remaining", AR 2373), about 15,600 acres burned at "medium intensity" (scorched tree crowns" but larger down wood debris remains, AR 2373), and about 29,200 acres

burned at "low intensity" ("live tree crowns, minor crown scorching, and a black ash layer on the soil surface," AR 2373). (AR 2485 (table) and 2486 (map)). The Tower Fire impacted 2,500 acres of neighboring private lands, with one-half of those acres already logged. (AR 1312). The EA for the Big Tower Project states that approximately 8,700 National Forest acres within the project area were severely burned, killing all of the trees, and under story shrubs, ground cover vegetation, soil surface litter, and humus in this area were completely consumed. (Id).[1]

When a wildfire burns National Forest System lands, the Forest Service promptly conducts a burned-area survey "to determine if watershed emergency rehabilitation treatment is needed" (Forest Service Manual 2523.03, AR 2370). The Forest Service prepared a report of its survey of the Tower Fire, dated September 16, 1996, called the Burned Area Report. (AR 2370-2387). The Burned Area Report found that 5,943 acres, within the 50,817 acre fire, burned with high intensity. (AR 2370-2371). Only stands with 90% plus dead trees were considered for salvage harvest in the Big Tower Planning Area Silvicultureal Prescription. The prescription states that the Big Tower Fire created a 8,700 acre opening within the planning area. (AR 1359-1370).

Leading up to the Burned Area Report, the Forest Service prepared a number of specialty reports, including reports on forest vegetation, recreation and trails, range, fish, soils and geology, and sensitive wildlife, aquatic, and plant species. (AR 2292-2473). The Burned Area Report recommended a number of emergency actions, such as grass

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[1] Defendant disputes these facts. These facts as modified are supported by the record. Defendants add additional facts which are included.

seeding of highly erodible soils, contour felling of burned trees, and correction of road drainage problems. (AR 2378-2386). These emergency actions were completed in late 1996. (AR 964).

Following the Burned Area Report, the Forest Service developed a Forest-wide recovery strategy for all the fires that burned in 1996. (AR 892-894). As early as December, 1996, the agency "envisioned that several fire salvage projects" would be identified with the Tower Fire area. (AR 893). The North Fork John Day Ranger District identified five timber sales in the Tower Fire area for further analysis, design, and implementation, including 96 Roadside Fire Salvage, Big Tower Project, South Tower, Cable and North Tower. (AR 1415). All five identified sales are within the North Fork John Day Subbasin, in the North Fork John Day Ranger District. (Id.)[2].

The John Day Basin is the only undammed major basin in the state, and the North Fork John Day River supports the largest and most important run of anadromous fish within this Basin. (AR 351). The North Fork and its tributaries support an estimated 70% of the total spring chinook salmon run and 43% of the summer steelhead run within the subbasin. (Id.). This is the largest spawning population of wild spring chinook and summer steelhead in the Columbia River System. (Id.).

The entire length of the North Fork John Day River within the burn area, about 1 1/2 miles, was in a low intensity

[2] Defendants object to plaintiffs' fact 17, and they add additional facts. The court has modified plaintiffs' facts to reflect information in the record, and added defendants' additional facts that are supported by the record.

burn area. (Id.). Although the North Fork John Day is not within the Big Tower Project area, it would be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks.(Id.)[3]. According to a 1994 scientific assessment of Oregon and Washington's Eastside Forests, completed by expert members of several professional scientific societies at the behest of members of Congress, the North Fork John Day River constitutes an aquatic diversity area, and is vital to the restoration of salmonid populations. (Sterne Declaration Exhibit A).[4] The 1990 Umatilla

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[3] Federal defendants dispute the characterization of the facts in paragraph 1 of plaintiffs' concise statement of facts, or that these facts are material. The facts cited by plaintiff are supported in the record. Additional facts from AR 1173 were added. The court also finds that these facts are material. Federal defendants' seek to add the following additional facts: "Most Chinook spawning and rearing within the North Fork John Day River basin occurs upstream of the area burned by the Tower Fire. The only chinook spawning and rearing areas burned by the Tower Fire burned at low intensity, (AR 1173) with little to no effect on riparian areas, AR 1173, 2486, 2567. In most streams in the North Fork John Day River subbasin the upper headwaters contain resident trout only, with steelhead and resident trout co-occurring in the lower reaches. Streams in headwaters are generally too shallow for the larger sized steelhead; the steelhead trout spawning and rearing habitat within the fire area tends to be downstream of the moderate to high intensity burn areas. (AR 2486, 2567). It is unclear whether the administrative record 1173 supports defendants' statements. Defendants cite to maps contained in the administrative record (AR 2486, 2567). The court cannot determine from looking at the maps whether defendants' facts accurately represent information contained in the maps. Much of the information does not appear to be contained on the maps.

[4] Defendants object to plaintiffs' fact 28, arguing that it is not relevant and it should be excluded as extra record materials. Certain circumstances may justify expanding review beyond the record. National Audubon Society v. U.S. Forest Service, 46 F.3d 1437, 1447 (9th Cir.

(continued...)

National Forest Land and Resource Management Plan (Forest Plan) designated much of the North Fork John Day Subbasin, including slightly more than half (51%) of the Tower Fire area, as a Special Fish Management Area C-7. (AR 2487, 3070). The C-7 management area is an outcome of the North Fork John Day Wilderness designation, which recognized the North Fork John Day River as important to anadromous fish, and provided special management consideration. (Umatilla Forest Plan 4-167).

In 1988, the North Fork John Day River was designated by Congress as a national Wild and Scenic river, indicating that the scenic, geology, fisheries, historic, and

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[4](...continued)

1994). The reviewing court may go outside the record to consider evidence relevant to the substantive merits of an agency decision: 1) to determine whether the agency considered all relevant factors, Thompson, 885 F.2d at 555; 2) to determine whether the agency's "course of inquiry was sufficient or inadequate", Alpine Lakes Protection Soc. v. U.S. Forest Service, 838 F.Supp. 478, 481 (W.D. Wash. 1993)(citations omitted); 3) when it is necessary to explain the agency's action; 4) when the agency has relied on evidence outside the record; 5) to explain technical terms or complex subject matter; or 6) when there is a showing of agency bad faith, National Audubon Society, 46 F.3d at 1447 fn.9. "[A]llegations that an EIS has failed to mention serious environmental consequences, failed to adequately discuss some reasonable alternative, or otherwise swept 'stubborn problems or serious criticisms . . . under the rug,' raises issues sufficiently important to permit the introduction of new evidence in the District Court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary." Suffolk County v. Secretary of Interior, 562 F.2d 1368, 1384-1385 (2nd Cir. 1977), cert. denied, 434 U.S. 1064 (1978)(adopted by the Ninth Circuit in Animal Defense Fund). Plaintiff allegations regarding the short comings of the EA are sufficient to meet this standard. Therefore, the court will permit the introduction of extra record materials.

wildlife values qualified as outstandingly remarkable. (AR 295)[5]. The section of river that borders on the fire, and is within the Big Tower Fire Project Area, is designated as Scenic. (AR 1829). No harvest is planned within the Scenic River corridor, and, in most cases, the closest harvest is more than one-half mile from the river. (Id.). Because of this buffer, the determination was made that there would be no effect on the recreational, visual, cultural, or wildlife values. (Id.). Fisheries management area standards and guidelines for the river corridor were met through implementation of FP standards and guidelines, mitigation, implementation of Best Management Practices (BMPs), and other standards included in the Big Tower Project. (AR 1329-1330).

The Tower Fire burned at high intensity along substantial portions of Texas Bar, South Fork Cable, North Fork Cable, Winom, Oriental, and Sheep Creek, causing destruction of riparian vegetation, and fish kills in at least some of these streams. (AR 983, 2545, 3072). The fire extirpated fish from several stream segments in South Fork Cable, Oriental, and Texas Bar Creeks. (AR 2545, 3072, 3079).[6] Fish kills were observed in the headwaters of South Cable, Oriental, and Texas Bar creeks after the fire, and were suspected in North cable Creek. (AR 2357-2358).

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[5] Defendants object to plaintiffs' fact 3 arguing that these facts are not material to plaintiffs' claims, and adding additional facts. As discussed above, the record reflects that the North Fork John Day would be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks. Therefore, the court finds these facts material. The court added the additional facts cited by defendants.

[6] Defendants dispute plaintiffs' fact 39, and add additional facts. The court has added defendants' additional facts.

Some recolonization has been documented where monitoring has occurred in South Cable, Texas Bar, and Oriental creeks. (AR 1844). A recolonization study of redband and bull trout, after fire kills in Idaho, found that fish populations approached levels of unaffected streams in one to three years. (AR 605-606).

The North Fork John Day drainage serves as a major migration route for big-game species. (AR 352). Approximately 2,500 elk and 1,000 mule deer use the drainage as a migration corridor between their winter and summer ranges. (Id.). The Tower Fire analysis area is located adjacent to the Bridge Creek State Wildlife Area, an important winter range used extensively by elk. (AR 1397).[7] The Tower Fire area is located within the southern portion of the Ukiah Management Unit, as designated by the Oregon Department of Fish and Wildlife (ODF&W). (AR 1397). This area is meeting overall population objectives set by the agency for elk and deer. (Id.).

In 1997, a second strategy was developed, which focused on the three major fires that had burned in the North Fork John Day District - Bull Fire, Summit Fire, and Tower Fire. (AR 964-968). The strategies called for a number of actions to be taken (AR 892-894, 965-968), one of which was a rapid ecosystem analysis at the watershed scale. (AR 892, 965). An interdisciplinary team was chartered, and it produced a rapid ecosystem report, the Tower Fire Ecosystem Analysis(TFEA), that was approved in March 1997. (AR 2474-2751).

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[7] Defendants object to this fact arguing that it is not material to plaintiffs' claims. One of plaintiffs' argument is that this is an ecologically critical area. These facts are material to that claim. The court has included defendants' additional facts.

The TFEA identified "restoration opportunities and salvage harvests." (AR 2480, 2590-2621). The opportunities for actions now comprising Big Tower Project were first identified by the interdisciplinary team - salvage harvest, revegetation, and road upgrading. (AR 2595-2605, 2591). The TFEA found that, as a result of the fire, "35 terrestrial wildlife species are expected to be extripated from the area which includes the potential reduction of 31 birds and 4 mammals. The occurrence of amphibians and reptile species after the fire is expected to be the same as it was prior to the fire, although, populations may be reduced somewhat." A list of the species not expected to inhabit the Tower Fire area for 15-20 years is contained in the administrative record. (AR 2586). The report stated that thirteen of the species had the potential for local extirpation unless their habitat needs were restored. (AR 2588)[8]. The TFEA also found that:

> "In general, the bird species not expected to inhabit the burn include forest raptors, live-tree bark gleaners, leaf gleaners, understory feeders, and mature crown nesters. The mammal species were primarily tree squirrels and under story foragers that require sizable areas with medium to large green trees and a developed understory. The lack of these habitat components in the area will result in the extirpation of some species for an extended period of time (60-80 years)." (AR 2586).

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[8] Defendants dispute plaintiffs' fact 42 and add additional facts. The court has modified fact 42, and included defendants' additional facts.

The TFEA cited a fire history study which indicated that ponderosa and warm/dry potential vegetation groups have been impacted the most by the advent of fire suppression. (AR 2503). According to the analysis, it is likely that these stands have missed 5-8 fire return events that would have modified the vegetation composition of the forest as well as the vertical continuity of the fuels. (Id.).

The TFEA contains recommendations for the restoration of habitat for the 13 species with the potential for extripation. (AR 2617-2618). The Big Tower Project EA incorporated these recommendations into its mitigation measures. (AR 1308-1309, 1561-1562).

It is estimated that between Big Tower, South Tower, and Cable[9], the Forest Service might propose the salvage of approximately 40-55 million board feet of timber.[10] (Id.). The volume estimate for the Big Tower project is 30 million board feet. (AR 1561). An additional 422 acres will be salvaged in the South Tower, which is being considered in a separate decision-making process. (AR 2223-2224).

The South Tower site would construct 4.7 miles of new temporary logging roads (3.2 miles for commercial thinning and 1.5 miles for Winom salvage), and then harvest

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[9] Defendants object to plaintiffs' fact 27 which states that: The Cable sale would remove an additional 6 million board feet from 1800 acres. Plaintiffs do not cite to any evidence in support of this fact. Defendants also seek to add additional facts, but the evidence they cite to does not support their facts. Therefore, the court will omit these facts.

[10] Defendants object to plaintiffs' fact 19, and adds additional facts. The court has modified plaintiffs' facts and added defendants' facts.

5.5 million board feet of timber from approximately 1200 acres. (Id.)[11]. The harvest includes 2.5 million board feet of commercial thinning on 780 acres, designed to improve tree vigor, adjust stand structure so low intensity prescribed fire could be reintroduced, and minimize potential for destructive crown fires. (Id.). It also includes the salvage of 3 million board feet from 420 acres, designed to achieve visual quality, hazard tree reduction, and species diversity objectives. (Id.). The project includes measures for slope stablization, subsoiling of previously affected areas, 422 acres of reforestation, 164 acres of riparian planting, wildlife habitat restoration, 23 5 miles of road obliteration, 45 miles of road repair, 173 acres of precommercial thinning, and control of vegetation competing with reforestation planting. (Id.). South Tower Fire Recovery Project is proposed to continue restoration following Big Tower Project. (AR 2223-2224).

In the "Tower Fire Salvage" project Categorical Exclusion (CE), the Forest Service proposed to log 0.9 million board feet of timber from 250 acres of the Tower Fires analysis area. (AR 1127)[12]. This decision was appealed, and the project was modified to treat only the hazard tree removal under a CE. (AR 1463).

In the 96 Roadside Project, the Forest Service initially decided to remove all of the hazard trees from 63 miles of logging roads within the Tower Fire analysis area, for an

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[11] Defendants dispute plaintiffs' fact 26, and adds additional facts. Plaintiffs' facts accurately reflect the record, and the court added defendants' facts.

[12] Defendants object to plaintiffs' fact 25, and add additional facts. The court has modified plaintiffs' facts and added defendants' facts.

estimated 6.0 million board feet of timber. (AR 1371-1388)[13]. The 96 Roadside Project was appealed, and the decision reversed in October 1997. (AR 1601-1603). The project was then scaled back to include only hazard trees. The new project, known as the Hairy Hazard Tree Project, was approved in November 1997. (AR 1815-1816).

Within the 96 Roadside EA, the Forest Service stated, "[a]s expected with any ground disturbing activity, the action alternatives would contribute to the cumulative effects of the Tower Fire and past and future management activities (including the planned Big Tower salvage sale) on soil erosion and sedimentation." (AR 1275)[14]. The EA also determined that some increases in sediment would be expected, which "may delay recovery of fish populations in the more heavily roaded watersheds." (AR 1279).

To the north of the Big Tower Project, the Forest Service continues to proceed with the 10.5 million board foot Camas timber sale. (AR 780-781)[15]. The Notice of Decision on the Camas sale modified alternative four to use an adaptive management approach. (Id.). The salvage sales will be monitored to determine if restoration objectives identified in the EA are being achieved. (Id.). The information obtained will be used in developing restoration activities for

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[13] Defendants object to plaintiffs' fact 23, because the 96 Roadside Sale decision was appealed and reversed, and this project no longer exists. The court has noted that fact.

[14] Defendants object to plaintiffs' fact 24, and refer back to the section on the use of BMPs to avoid theses effects. Plaintiffs' facts accurately reflect the record.

[15] Defendants object to plaintiffs' fact 21. The court has modified this fact to reflect new information cited by defendants.

the remainder of the project, which includes the harvest of 6 million board feet of timber in 2000 and 5.5 million board feet in 2001. (Id.). The total volume from the Camas sale is estimated to be 26.5 million board feet. (Id.). The Camas sale drains into the Camas Creek, and not directly into the North Fork John Day River. (AR 789).

To the south of the Big Tower Project, the Forest Service plans to reenter one 35 acre unit of the Turner Otter Salvage Sale and remove 140 thousand board feet of dead timber. (AR 1124). The harvest responds to the purpose and need and the key issues identified in the 1992 EA.[16] (Id.). Restoration activities are planned for the Bull fire area. Activities planned for the Bull Fire area focus on fire restoration and vegetative recovery. (AR 1661).

The Big Tower Project EA accounted for the cumulative effects of the 1996 Roadside Salvage. (AR 1313, 1315). The South Tower Project was still in the planning stages when the Big Tower EA was prepared and approved. (AR 1600, 1302).

The Big Tower Project is a collection of actions intended to help restore an area of the Umatilla National Forest that was burned by the Tower Fire to a condition within the range of natural variability. (AR 217, 266, 966). The Big Tower Project consists of a number of actions to be taken over a period of time: (1) salvage harvest timber sales of about 30 million board feet on about 4,200 acres with about 11 miles of temporary road construction for the sales; (2) tree planting on those roughly 4,200 acres once the trees

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[16] Defendants object to plaintiffs' fact 22, and additional facts. The court has modified these facts according to information in the record.

are harvested; (3) an additional 4,500 acres to be planted by native conifers, hardwoods, and shrubs; and (4) reconstruction of 7 miles of an all-purpose, multiple-use, permanent road. (AR 1291, 1302-1305, 1560-1561).

The final administrative decision on Big Tower Project was made on September 9, 1997, following an open public review process. (AR 1557-1572). The decision was appealed by the Blue Mountain Native Forest Alliance, the Blue Mountains Biodiversity Project, et al., and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). (AR 1665-1813). Informal disposition of the appeal was not successful. (AR 1814, 1817-1818). The deciding officer on appeal upheld the decision in December 1997. (AR 1847-1850). Plaintiffs brought this action on January 22, 1998.

The salvage timber sales, included in the Big Tower Project, are "designed to recover the value of burned timber and begin the recovery of vegetative conditions" on a portion of the area burned by Tower Fire. (AR 966). The particular area for salvage harvest was selected "because it contains the largest volume of high value Ponderosa pine saw timber...over 90% of the trees were dead and chances of natural regeneration were poor due to loss of mature seed trees." (AR 966, 2682-2683).

The Forest Service prepared an EA, and circulated the EA for comment by interested members of the public and agencies. (AR 1285-1338, 1423-1436). The EA was available for review at two open house public meetings. (AR 1446, 1475-1476, 1488, 1502). After a 30-day comment period, the Forest Service responded to substantive comments

it had received. (AR 1423, 1568-1571). The Forest Service determined that the effect on the human environment from the Big Tower Project was not significant, and recorded its determination - a Finding of No Significant Impact. (AR 1566-1567). The Forest Supervisor selected alternative 2 from EA, with modifications, and recorded the decision in a Decision Notice. (AR 1557-1567).

The EA prepared by the Forest Service considered and assessed seven alternatives: the "no-action" alternative, two "action" alternatives, and four alternatives that were not considered in detail. (AR 1302-1307). Comments on the EA alleged that the range of alternatives in the EA was not adequate, and the Forest Service responded to that allegation before a decision was made. (AR 1568). At the time of decision, the Forest Supervisor considered all seven alternatives. (AR 1563-1564). In their appeal of the Forest Supervisor's decision, appellants alleged lack of a reasonable range of alternatives. (AR 1680-1682, 1776-1777). The Forest Service considered the allegation on appeal, and the deciding officer determined that the range of alternatives was adequate. (AR 1820, 1831-1832, 1849).

Only dead trees and trees expected to die in less than a year will be cut in the Big Tower Salvage Project. (AR 1561). All trees less than 9 inches in diameter will be retained. (AR 1303). Unlike the rehabilitation of previous fire burn areas, the Big Tower Project excludes timber harvest entirely from the moderate and low intensity burn areas, and harvest will occur only in areas with 90 percent or greater tree mortality. (AR 129). In addition, near year-round streams, all living and dead trees that provide stream

shade or would be a potential source of beneficial large woody debris will be retained. (AR 1561).

Harvest will occur on gentle and steep slopes and low and high erosive soils. (AR 1319). The fire created 32,000 acres of erosive soils, and, in order to clear trees for the planting of new seedlings, harvest must occur on these soils. (AR 1313, 2368). The Forest Service is adopting numerous erosion prevention measures including the use of helicopter logging, minimizing road stream crossings, rehabilitating existing roads that are sources of sediment, and establishing buffer strips adjacent to the streams. (AR 1291).

The Forest Service adopted a specific BMPs for the Big Tower Project. (AR 1153-58). The Forest Service will strictly adhere to BMPs. (AR 1563). Compliance with BMPs will be closely monitored as the project is implemented. (AR 1310).

The Big Tower Project EA assessed old-growth, management indicator species (MIS), threatened, endangered, and sensitive species (TES), and other species. (AR 1301, 1320-1323, 1327-1331, 1333-1335). Preceding the EA, specialist reports were prepared for wildlife species, fisheries and aquatics, a biological evaluation for wildlife Threatened and Endangered Species (TES), and a biological evaluation for aquatic TES. (AR 1172-179, 1394-1412, 1447-1460, 1547-1549). At the time of the decision, one of the key issues was fisheries habitat and water quality, including certain Management Indicator Species and TES species. (AR 1560, 1563).

On appeal, Blue Mountains Biodiversity Project raised issues of old-growth, MIS, and TES. (AR 1693-1708). The Forest Service considered these issues on appeal, and the appeals deciding officer determined that the assessment was adequate. (AR 1822-1826, 1848-1849).

The Forest Service has monitored the population trends of MIS, as indicated by these excerpts from the annual Umatilla National Forest monitoring reports: 1993 (AR 410-428); 1994 (AR 503-523); 1995 (AR 817-836); and 1996 (AR 1339-1358). The 1997 annual monitoring report has not yet been released.

The Forest Service determined that Big Tower Project was consistent with the Forest Plan, if certain amendments were made. (AR 1336). Those amendments were made at the time of decision. (AR 1565). The specific amendments are described in the EA. (AR 1292-1293).

PACFISH standards will be met. (AR 1828)[17]. The original proposal for harvest as described in the EA, would have included harvest in the outer 50 percent of "Category 1" PACFISH buffer zones. (AR 1305). At the time of the decision, the Forest Supervisor decided, as a mitigation measure, that harvest could only occur in the outer 50 percent if a fish biologist or hydrologist could determine that resource risks were low enough. (AR 1561). Subsequently, when it was discovered that this was impractical, the decision was mitigated again so that no harvest in PACFISH buffer zones was allowed. (AR 1828, 1846).

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[17]PACFISH refers to a set of amendments made simultaneously to all Forest Plans in eastern Oregon and Washington, Idaho, and portions of California that contained anadromous fish producing watersheds. PACFISH is a strategy for the conservation of riparian environments.

The Big Tower Project is consistent with the existing stream buffers for Riparian Habitat Conservation Areas ("RHCA"), as adopted by the PACFISH amendments to the Forest Plan. The PACFISH buffers prohibit or restrict activities within 50 to 300 feet on each side of the stream depending on the stream class. (AR 485, 1869, 1116-1120). The Big Tower Project does not allow timber harvest closer than 150 feet of perennial streams and 50 feet of intermittent streams. (Id.). The buffers exceed the 100 foot maximum buffer along perennial streams in the BMPs for the State of Oregon. (OAR 629-635-0310). The Big Tower Project is designed to locate temporary roads away from streams and minimize stream crossings. (AR 1308, OAR 629-625-0200). No new permanent roads will be constructed. (AR 1291).

While sediment will be produced by salvage activity, the increase is anticipated to be small relative to fire induced increases. (AR 1317). Sediment is a problem in both roaded and unroaded areas. (AR 1314). The EA also explains that the proposed alternative will include stabilization and closure of roads that contribute sediment to streams. (AR 1317).

The Forest Service conducted a thorough assessment of the existing watershed condition to help assess the environmental consequences of the Big Tower Project. (AR 982-1004, 2292-2332, 2476-2751). The Forest Service conducted field inventory work on Big Tower Project to assess the riparian habitat conditions for fish. (AR 3068-3103). The field surveys also collected information about the large woody debris, pool depth, and total stream cover. (AR 3082). The EA considered information that was collected on stream water temperature in the Big Tower analysis area. (AR 3074-3079).

The Forest Service determined that Big Tower Project will comply with Oregon water quality standards. (AR 1567). The issue of water quality was assessed in the water resources report, preceding the EA. (AR 990-991). Specific BMPs were developed for Big Tower Project, preceding the EA. (AR 1153-1158). Water quality was assessed in the EA. (AR 1297, 1320-1323, 1336). At the time of decision, water quality was a key issue. (AR 1560, 1563). Compliance with water quality standards was an issue on appeal, and the appeals deciding officer upheld the record. (AR 1826, 1849).

The Big Tower Project incorporated BMPs into all of the alternatives, including locating harvest units well outside of stream-side buffers, requiring cables or helicopters suspend logs off the ground on steeper slopes to minimize erosion, and dispersing subsurface drainage associated with roads. (AR 1153-1158, 1291, 1308-1309, 1438-1439, 79-167). The BMPs were modified after the EA was published and the changes were endorsed by resource specialists. (AR 1437).

The planning area for the proposed Big Tower Project encompasses all National Forest land within the South Fork Cable, Texas Bar, Turner, Otter, and Oriental subwatersheds. (AR 986). All these subwatersheds, except for the South Fork Cable, drain directly into the North Fork John Day River. (Id).[18] The project area is located entirely within the area burned by the Tower Fire. (AR 1314). It is bounded by the North Fork John Day River to the south, Forest Service

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[18] Defendants dispute these facts. The court has modified these facts according to information contained in the record, and added defendants' additional facts.

Road 52 to the north, and the North Fork John Day Wilderness to the east. (AR 1288). The project area is the area considered for management activities, while the analysis area was used to analyze the effects on a broader scale or to encompass mobile resources such as fish, wildlife, and soil. (Id.).

Wildlife habitat structure within the analysis area has changed dramatically. (AR 1396). Forested habitats have been converted to a very early seral stage that will be dominated by grasses and forbs for several years. (Id.)[19]. 45 percent of the vegetation within the project area was severely burned, and this area does not provide cover under the Forest Plan's definition for cover. (Id.). Harvest would cause an increase in vulnerability to big game during hunting season[20]. (Id.).

The Forest Service has logged much of the analysis area in the past, resulting in soil compaction and soil disturbance, loss of vegetative cover, and many miles of logging roads. (AR 1318).[21] Past regeneration-type harvesting occurred on 1900 acres within the analysis area. (Id.). Timber harvesting results in soil compaction and disturbance. (Id.).

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[19] Defendants dispute plaintiffs' fact 10, and defendants have added additional facts. The court has modified this statement to reflect information in the record, and added defendants' facts.

[20] Defendants object to plaintiffs' fact 16. The court has modified it to reflect information in the record.

[21] Defendants dispute these facts, and adds additional facts. These facts are supported by the record. The court added defendant's additional facts with modifications.

The Forest Plan identifies allowable limits of soil compaction and distribution that will maintain acceptable productivity potentials. (Umatilla Forest Plan 4-80). Compliance with these standards is monitored annually and reported in the Umatilla National Forest's yearly monitoring report. (AR 410, 503, 817, 1339).

The Big Tower Project proposal involves construction of eleven miles of temporary roads, and reconstruction of seven miles of existing roads to access and log 30 million board feet of timber from over 4,186 acres. (AR 1303). Existing road densities within the analysis area average above four miles per square mile, which is considered moderately high. (AR 1318). This is above the Forest Plan's desired future condition of two miles of road per square mile for open roads. (Umatilla National Forest Plan 4-11). No new permanent roads will be constructed as part of this project, and the temporary roads will be closed, obliterated, and treated, where necessary, by subsoiling, waterbaring, and seeding, upon completion of the project activities. (AR 984, 1291). In addition, temporary roads would avoid swales. (AR 985).[22]

Sixty-five percent of the project (2,270 acres) would involve logging on soils with high erosion potential. (AR 1317, 997). "Of this area of high erosion potential, tractors would skid logs off 527 acres." (AR 997).[23] Another 1,184

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[22] Defendants object to plaintiffs' fact 11, and add additional facts. The court has modified both plaintiffs' and defendants' facts to reflect information contained in the record.

[23] Defendants object to plaintiffs' fact 12, and add additional facts. The court finds plaintiffs' facts accurately reflect the record and

(continued...)

acres of the proposed harvest would occur on soils with "moderate" erosion potential, with 526 of these acres again logged with tractors. (AR 998)[24].

The initial units proposed for tractor logging, which fell within the high erosion hazard designations, were field checked by the Forest Service soil scientist to determine their suitability for tractor logging from an erosion hazard viewpoint. (AR 2036). It was determined that many of the units were on suitable slopes, and that tractor logging could proceed without unacceptable risk. (Id.). In other cases, units or portions of units were either dropped from the project, or the logging system was changed to a helicopter or skyline system, which are well adapted for operation on steep, erodible areas, since they cause minimal surface disturbance. (AR 954-955, 1135, 1214, 1217-1219, 2036).

Tractor skidding is "the logging system most likely to reduce ground cover and compact soils, resulting in increased soil erosion potential."[25] However, past observations of logging unburned areas with these soil types has shown that large increases in erosion do not occur after logging as a result of implementation of BMPs . Implementation of soil erosion control BMPs, such as water barring and seeding, and

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[23](...continued)
has added defendants' additional facts.

[24] Defendants object to plaintiffs' fact 4, citing to their objection to fact 12. The court finds that this statement accurately reflects the record.

[25] Defendants object to plaintiffs' fact 13, and add their own facts. The court finds this sentence accurately reflects the record and has included the additional facts added by defendants.

the Big Tower Project area's low rainfall intensity would minimize the erosion potential. (AR 1317).[26]

In the Beschta scientific report, prepared by academic, federal agency, and tribal scientists, the authors determined, that "there is no ecological need for immediate intervention on the post-fire landscape. With respect to the need for management treatments after fires, there is generally no need for urgency, nor is there a universal, ecologically-based need to act at all. By acting quickly, we run the risk of creating new problems before we solve old ones. Ecologically speaking, fires do not require a rapid human response." (AR 566).[27] The Beschta Report further determined that post-burn management activities that accelerate erosion or create soil compaction must be prohibited. (AR 568-569). The report concluded that salvage logging by any method must be prohibited on sensitive soils, including in severely burned areas, on erosive sites, on fragile soils, in riparian areas, on steep slopes, or on any other site where accelerated erosion is possible. (AR 569). The report concluded that no new logging roads should be constructed after an intense wildfire. (AR 569-570).[28]

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[26] Defendants object to plaintiffs' fact 15 which states that: Logging is also proposed within the Riparian Habitat Conservation Areas, citing AR 997. It is unclear from the record whether this fact is supported by AR 997. Therefore, the court has excluded it. Defendants have added additional facts which were included.

[27] Defendants object to plaintiffs' fact 29, and add additional facts. Plaintiffs' facts accurately reflect the record, and the court has added defendants' additional facts.

[28] Defendants object to plaintiffs' fact 30, and add additional facts. Plaintiffs' facts accurately reflect the record, and the court has

(continued...)

The Regional Forester advised the Forest Supervisors that for each individual project or group of similar projects, the Beschta report must be reviewed to determine its applicability to the site-specific conditions and issues in the project area. (AR 560-561).[29] The Beschta report and this directive are contained in the administrative record. (AR 560-576).

Richard Everett, a science team leader for the Forest Service, reviewed the Beschta report and other scientific information, and issued his own report. (AR 577). The Everett report opines that: "unless dead material is removed and stands are subsequently managed for historical tree densities, future fuel loadings will be outside the historical range of variability for both live trees and dead and down, creating the potential for intense reburn situations." (AR 580). The Forest Service is likely to use low-intensity, management ignited fires in the future in dry forest types to achieve vegetative structure and species composition objectives. Excess fuels must be removed from the area to successfully implement this program. (AR 1288). The Everett report opines that the natural decay process is unlikely to remove the current dead tree material before the next fire event, and, therefore, recommends managed reduction in fuel loading. (AR 584). According to the Everett report, "[t]he urgency to remove woody biomass is not based on reducing short-term fire hazard, but on the capture of the economic values and reduction of long-term

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[28](...continued)
added defendants' additional facts.

[29]Defendants object to plaintiffs' fact 31 and add additional facts. Plaintiffs' facts accurately reflect the record, and the court added defendants' additional facts.

fire hazard. The urgency comes from removing wood before it decays, becomes less economically feasible to extract, and makes further reductions in fuel loading more expensive to the American taxpayers." (AR 582).

Soil productivity/erosion/sedimentation was a key issue in the Big Tower Project EA. (AR 1296-1297). The Forest Service implemented the use of BMPs and mitigation to keep effects on soils within Forest Plan standards. (AR 1153-1158, 1308).

A December 1996 Forest Service fire recovery strategy document stated, with reference to the Tower Fire recovery: "[s]ince the Umatilla Tribes have formally requested consultation on this project, and due to the unique fisheries and water quality values this area exhibits, it is envisioned this area will be controversial. One or more EISs may be initiated in the roadless portions of the fire area, depending on the outcome of the ecosystem analysis. We will begin our project analysis in the roaded, less complex portions of the fire area." (AR 893).

No part of the Big Tower Project enters a roadless area. (AR 2488). The Forest Service acknowledged that harvesting in any of the roadless areas would in all probability require preparation of an EIS. (AR 1833).

On January 18, 1997, ODF&W made the following comments: "[h]arvesting with ground based equipment in areas that have been burned has great potential for contributing large amounts of sediment to streams and may do more damage to the watershed than the fire has. If ground based logging is utilized, how will disturbances to the soil

and subsequent increases in turbidity be dealt with?" (AR 953).[30] ODF&W, in a letter dated August 15, 1997, made some general comments after reviewing the Big Tower Project EA. (AR 1499). The letter suggests that erring on the conservative side for entry into RHCA's and PACFISH buffers would reduce the chances of sediment delivery. It also recommends that sites with anything but very low risk for sedimentation, soil erosion, channel drainage, and cumulative effects should not be entered. It suggests that avoiding the construction of even temporary roads would help ensure minimal increases in sediment production. (AR 1499-1500).

Concerns regarding soil disturbances and increases in turbidity were considered in key issue 2 (SoilProductivity/Erosion/ Sedimentation) and key issue 3 (Fisheries Habitat/Water Quality) in the EA. (AR 1296-1298). The rationale for selecting alternative 2, as modified, is contained in the Decision Notice. (AR 1557-1572).

The Confederated Tribes of the Umatilla Indian Reservation, in a letter dated August 20, 1997, made comments regarding the Big Tower Project EA. (AR 1533). The letter points out that: "It is clear from the District's selection of alternative 2 as the preferred alternative that protection and restoration of fish habitat is a secondary issue in this project. . . . The TFEA noted that salvage logging in RHCAs would not benefit fish populations, aquatic habitat or other riparian values, yet the EA alternative 2 would log and build skid trails within RHCAs. The EA recognizes that

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[30] Defendants dispute plaintiffs' fact 33, and add additional facts. The court has modified some of plaintiffs' facts and included defendants' additional facts.

tractor logging will produce a greater amount of sediment than the helicopter logging in alt. 3. Nevertheless, the EA prefers alt. 2, presumbly (sic) for economic reasons." [31]. (AR 1535). Conservation organizations disputed the need to build roads into burned areas, the narrow stream buffers, potential impacts on soils, and the alleged "nonsignificance" of logging 30 million board feet and building logging roads into a sensitive area. (AR 1537, 1504). Hydrologist Jon Rhodes applied the Forest Service's sediment yield model for the Boise National Forest to estimate the impacts of its logging and road building proposal, and, based on this, he concluded that the increase in sedimentation and erosion would be "certainly significant" for the impacted subwatershed. (AR 1797)[32].

The Big Tower Project EA project implementation section provides, in part, that:

> "Skid trails, landings, and temporary roads will be designated. Where possible, temporary roads which parallel stream channels should not be constructed within 300 feet of class 1 and 3 streams and 100 feet of class 4 streams. Skid trails and temporary roads will not be placed in the bottom of swales (drainages without defined channels) ir within RHCAs, except at designated crossings. Designated crossings would only be used to reduce the length (by 1/2 mile or

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[31] Defendants dispute plaintiffs' fact 34, and add additional facts. The court has added defendants' additional facts.

[32] Defendants dispute plaintiffs' fact 36, and add additional facts. The court has included defendants' additional facts.

more) of skid trails or temporary roads that otherwise would have to go around these areas. The District Hydrologist or Fish Biologist would review locations."[33] (AR 1308).

Oregon designated the North Fork John Day as water quality limited for temperature, and Cable Creek as impaired due to temperature and habitat modification.[34] (AR 983, 2497). The Big Tower EA states that, under alternative 2, it is unlikely that the proposed harvesting would have any measurable effects on stream temperature. No trees would be felled in the effective area for vegetative shading, so stream temperatures would not be affected, and stream shade would be accelerated where planting would occur within the RHCAs. (AR 1322).

Mr. Rhodes opines that the Big Tower EA and the TFEA fail to make any estimate of the likely magnitude of erosion and sedimentation delivery caused by the fire. (AR 1794). The Forest Service included a report on the effects of fire on soils and water in the administrative record. (AR 8-77). These reports contain data collected from research watersheds regarding erosion and soil loss after fires. (AR 31). These reports contain other reports on the rates of erosion observed after fires, and information on how water quality is effected after a fire. (AR 54-55, 58-59).

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[33]Defendants dispute plaintiffs' fact 37, and add additional facts. The court has modified these facts and added defendants' additional facts.

[34] Defendants dispute these facts, dispute whether these facts are relevant to plaintiffs' claims, and add additional facts. The court has included defendants' additional facts.

The erosion increases associated with the Big Tower sale "would primarily result from construction of 11.3 miles of temporary roads, skid trails on 2,164 acres, and landings. These actions would have short-term effect on upland soil erosion and sedimentation rates . . .". However, "mitigations of subsoiling temporary roads, skid trails, and landings and erosion control seeding would reduce the intensity and duration of these effects." Harvesting is expected to increase erosion rates, but these increases are expected to be small in comparison to the fire induced increases. The use of soil erosion BMPs is expected to minimize erosion potential. (AR 1317).[35]

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir.), cert. denied, 502 U.S. 994 (1991). The moving party bears the initial burden of proof. See Rebel Oil Company, Inc. v. Atlantic Richfield Company, 51 F.3d 1421, 1435 (9th Cir.), cert. denied, 516 U.S. 987 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. Id.

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[35] Defendants dispute plaintiffs' fact 41, and have aded additional facts. The court has modified fact 41, and included defendants' additional facts.

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. Allen v. City of Los Angeles, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. Id. If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed.R.Civ.P. 56(e); Auvil v. CBS "60 Minutes", 67 F.3d 816 (9th Cir. 1995), cert. denied, 517 U.S. 1167 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. Id.

III. DISCUSSION

Standards for Review of Agency Decision

A challenge to an agency's decision not to prepare an EIS presents a "factual dispute the resolution of which implicates substantial agency expertise". Greenpeace Action v. Franklin, 14 F.3d 1324, 1330 (9th Cir. 1993). In cases where "a litigant challenges an agency determination on the grounds that, in essence, allege that the agency's expert review . . . was incomplete, inconclusive, or inaccurate . . . the greater degree of deference expressed by the arbitrary and capricious standard is appropriate." Id. at 1331-1332 (citation omitted). The resolution of factual disputes between the agency's scientific conclusions and those of the plaintiff's experts are subject to the arbitrary and capricious standard of review. Id. at 1331. Decisions involving primarily legal questions are reviewed under the reasonableness standard.

Northcoast Environmental Center v. Glickman, 136 F.3d 660, 667 (9th Cir. 1997).

This case involves predominantly factual determinations, rather than legal determinations. In this case, plaintiffs are challenging the Forest Service's determination that the project would have no significant impact, rendering an EIS unnecessary. This determination was based on the factual determinations of the agency's experts regarding the environmental impacts of the project, and other factual determinations made in deciding whether an EIS was necessary. The court finds that the appropriate standard of review is arbitrary and capricious.

The arbitrary and capricious standard requires the court to ensure that an agency has taken the requisite "hard look" at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is "founded on a reasoned evaluation 'of the relevant factors' " and whether there has been clear error in judgment. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)(quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). An agency's decision may only be called arbitrary and capricious if the agency: relied on factors which Congress did not intend it to consider; entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before the agency; or offered and explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Southwest Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1448 (9th Cir. 1996) (internal citation omitted).

When determining whether an agency's decision is arbitrary and capricious, the court's inquiry into the facts should be searching and careful. Greenpeace Action, 14 F.3d at 1332 (citation omitted). "But, when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Id. (citation and quotations omitted). Even when a plaintiff presents expert opinions raising questions regarding an agency's analyses, methodology, and conclusions, such opinions have been viewed by the courts as "a difference of scientific opinion." Id. at 1333.

NEPA does not require the court to decide whether an agency's evaluation is based on the best scientific methodology available or to resolve disagreements among various scientist as to methodology. Id. (citation and quotations omitted). The court is not empowered to decide that the views of the plaintiff's experts have more merit that the agency's experts. Id. When an agency "is making predictions, within its area of special expertise, at the frontiers of science", the court should defer to an agency's scientific determinations. Baltimore Gas & Electric v. Natural Resources defense Council, Inc., 462 U.S. 87, 103 (1983).

NEPA Regulations

NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "An agency must prepare an EIS if substantial questions are raised as to whether a project . . . may cause a significant

degradation of some human environmental factor. The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." Greenpeace Action, 14 F.3d at 1332 (citations and quotations omitted).

The Council on Environmental Quality (CEQ) promulgated regulations governing the agency's obligations and responsibilities in applying NEPA. See 40 C.F.R. §§ 1500-1508. The regulations describe three categories of agency action and specify the kind of agency review of environmental issues that is required for each. The categories are: (1) actions that may significantly affect the environment and thus generally require a full environmental impact statement (EIS), 40 C.F.R. § 1501.4(a)(1); (2) actions that may or may not have a significant environmental impact and thus ordinarily require only a more limited environmental assessment (EA) to determine whether an EIS is necessary, 40 C.F.R. § 1501.4(c); and (3) actions that typically do not have a significant effect on the human environment and thus qualify for a "categorical exclusion" from the requirements for the preparation of an EA or an EIS, 40 C.F.R. §§ 1500.4(p), 1501.4(a)(2) and 1508.4.

An EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. §1508.9(a). The information presented in the EA must be of "high quality", and include "accurate scientific analysis". 40 C.F.R. §1500.1(b).

If the agency determines, based on the EA, not to prepare an EIS, the agency must prepare a Finding of No Significant Impact (FONSI). 40 C.F.R. §1501.4(e). The agency must adequately explain its decision not to prepare an EIS by supplying "a convincing statement of reasons why potential effects are insignificant." The Steamboaters v. F.E.R.C., 759 F.2d 1382, 1393 (9th Cir. 1985). The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impacts of the project. Id.

Plaintiffs make the following arguments in support of their motion for summary judgment:

1) the Forest Service failed to consider the proposed projects within the Tower Fire Area, which are similar in timing and geography, and will have cumulative impacts on the environment, in a single NEPA document;

2) the Forest Service failed to adequately address and consider the intensity and significance of the Big Tower Project which involves ecologically critical areas, highly controversial effects, highly uncertain, unique, and unknown risks, cumulative impacts when considered with other projects, and threatens violation of other environmental laws; and

3) an EIS is required because substantial questions remain concerning the potential environmental impacts of the Big Tower Project.

Defendants move for summary judgment and oppose plaintiffs' motion for summary judgment and permanent injunction based on the following arguments:

1) the Forest Service properly separated the Big Tower project from other projects using tiering and scoping;

2) the Forest Service properly considered cumulative impacts on the environment;

3) the Big Tower Project has been designed and modified to avoid significant adverse impacts on the environment;

4) mere proximity of the project to environmentally critical areas is insufficient to trigger the need for an EIS;

5) opposition to the project and disagreement among scientists does not make the project highly controversial;

6) plaintiffs' argument regarding uncertain effects and unknown risks lacks merit;

7) the Big Tower Project will comply with Oregon water quality standards;

8) the Forest Service has adequately addressed the "substantial questions" raised by plaintiffs;

9) the Big Tower project will not have a significant effect on the human environment;

10) the Forest Service considered the alternatives required by NEPA;

11) the Forest Service disclosed the potential effects of the Big Tower Project on water quality;

12) the Forest Service complied with NFMA; and

13) the Forest Service complied with the CWA.

Defendants-Intervenors move for summary judgment and oppose plaintiffs' motion for summary judgment and permanent injunction based on the following arguments:

1) the Forest Service has complied with state water quality standards;

2) the Forest Service has adequately addressed cumulative effects; and

3) the Big Tower Project contains an adequate range of alternatives.

In their reply, plaintiffs make the following additional arguments:

1) CEQ regulations regarding scoping require the Forest Service to do one EIS for similar and cumulative actions; and

2) the concept of tiering does not match the facts of this case because there is no site-specific EIS for any of the sales in the Tower Fire area, and, this is not a case where the Forest Service would be forced to focus on issues that are not yet ripe.

In their reply, defendants and defendant-intervenors make the following additional arguments:

1) the Big Tower EA is tiered to the Forest Plan EIS;

2) plaintiffs have failed to raise substantial questions that the Big Tower Project may significantly affect the quality of the human environment;

3) the Finding of No Significant Impact is supported by the context and intensity of the sale; and

4) there is no controversy over the environmental effects.

Scope of the Big Tower Project EA

Plaintiffs argue that: the Forest Service's failure to consider five proposed projects within the Tower Fire Area, 96 Roadside/Hairy Hazard, Big Tower, South Tower, Cable, and Tower Fire Salvage, which are similar in timing and geography, and will have cumulatively significant impacts[36] on the environment, in a single NEPA document violates NEPA regulations and long-standing Ninth Circuit precedents; the five projects involve the same geographic project area, because they are all within the Tower Fire analysis area, within the North Fork John Day Subbasin, and within the North Fork John Day Ranger District; the five projects are related, because they are all in reaction to the 1996 Tower Fire; the timing of the projects are very similar, because they are all moving forward simultaneously; the concept of tiering does not match the facts of this case

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[36]The court will address the issue of cumulatively significant impacts in the Intensity and Significance section of the discussion.

because there is no site-specific EIS for any of the sales in the Tower Fire area, and, this is not a case where the Forest Service would be forced to focus on issues that are not yet ripe; the Forest Service separated the projects to allow some projects to move forward in case other projects were held up by appeals and to speed up the NEPA process; and the multiple proposed projects have been reasonably foreseeable since at least July of 1997.

Federal defendants argue that: the Big Tower Project has independent utility and can be the subject of its own EA/FONSI; the Forest Service properly tiered the Big Tower Project to the Forest Plan and to other earlier and later projects; the Camas project, the Bull Fire, and the Summit Fire are in a different subwatershed then the Big Tower Project; the Forest Service did not err by dividing the projects into separate NEPA documents because the documents are tiered to each other and the Forest Plan, and they are scoped according to the rules on scoping; and the Forest Service had a rational basis for separating post-fire recovery actions into discrete decisions. Defendant/Intervenors argue that the Bull Fire and the Summit Fire projects have independent utility and are not related to the Big Tower Project.

Scope is defined as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement." 40 C.F.R. §1508.25. Agencies are given considerable deference in defining the scope of an EIS, but "there are situations in which an agency is required to consider several related actions in a single EIS. . . . Not to require this would permit dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a

substantial impact." Thomas v. Peterson, 753 F.2d 754, 757 (9th Cir. 1985). CEQ regulations require the agency to consider connected actions, cumulative actions[37], and similar actions[38] in a single EIS. Id. at 758.

The rule against segmentation has exceptions, such as when a project has independent utility or independent significance. See Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974). To prevail on their challenge to the scope of the EA, plaintiffs must show that the Forest Service intentionally segmented the five projects in order to evade the required NEPA documentation, or that the Forest Service's decision to segment the projects was arbitrary and capricious. Foundation for Global Sustainability Incorporated's Forest Protection and Biodiversity Project v. McConnell, 829 F.Supp. 147, 150 (W.D.N.C. 1993). If the Forest Service provides sufficient, legitimate reasons for segmentation, the decision to segment will not be considered arbitrary and capricious. Id.

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[37] Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts. 40 C.F.R. §1508.25(a)(2). "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.

[38] Similar actions are "actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. . . ." 40 C.F.R. §1508.25(a)(3).

In this case, the Forest Service has provided sufficient, legitimate reasons for segmenting the five projects, and for not considering cumulative impacts of the Bull Fire, Summit Fire, and Camas Sale. Only 1% of the Camas area is in the Tower Fire. The Bull Fire and the Summit Fire are located a substantial distance away from the Big Tower Project area. The Forest Service divided the projects based on urgency and the goal of the project.

After the Forest Service took the emergency actions recommended in the Burned Area Report, it proceeded with the Hairy Hazard Tree Project. (AR 966, 1371-1388, 1815-1816). The purpose of this project was to remove safety hazards from along open roads and to create fire breaks along the roads. The project was to be implemented the summer after the fire. (AR 966). The original project was appealed and scaled back to focus only on removal of hazard trees. (AR 1815-1816).

The Forest Service's next priority was the Big Tower Project. The purpose of this project is salvage harvest, revegetation, and road upgrading. (AR 2591, 2595-2605). The timber needed to be recovered quickly to minimize the amount of timber value loss due to deterioration, cracking, and blue stain. (AR 1291).

The next planned action is the South Tower project. The project's main focus is restoration. Timber harvesting activities are not the focus of the project. The project includes slope stablization, subsoiling, 422 acres of reforestation, 164 acres of riparian planting, wildlife habitat restoration, road obliteration, road repair, pre-commercial thinning, and vegetation control. (AR 2223-2224). Plaintiffs

have presented some evidence that the Forest Service segmented the projects to speed up the NEPA process and to avoid having some projects held up in appeals. However, the record shows that the Forest Service had legitimate, rational reasons for splitting up the projects, and while the Forest Service did issue categorical exclusions for the Hairy Hazard Tree project and the Tower project, the Forest Service is completing EAs for the Big Tower Project, the South Tower project, and the Camas project. Based on these reasons, the court does not find that the Forest Service's decision to segment the projects was arbitrary and capricious.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY
PROJECT, et al.,
Respondents.

Appendix to Petition for Writ of Certiorari

VOLUME 2 of 2

(A-63 to A-123)

Michael E. Haglund
Counsel of Record
HAGLUND, KIRTLEY,
KELLEY & HORNGREN, LLP
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

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Intensity and Significance

When determining whether an action is "significant", the agency must consider the intensity of its impacts. 40 C.F.R. §1508.27(b). In evaluating intensity, the agency should consider the following factors:

"(3) Unique characteristics of the geographic area such as proximity to . . . wild and scenic rivers, or ecologically critical areas.

(4) The degree to which effects . . . are likely to be highly controversial.

(5) The degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks. . . .

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact[39] on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. . . .

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[39]"Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." Id.

The agency may consider the extent to which mitigation measures offset adverse effects, however, mitigation measures need not completely compensate for adverse environmental impacts. Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993). The agency must analyze the mitigation measures in detail and explain how effective the measures would be. Northwest Indian Cemetery Protective Ass'n V. Peterson, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, Lyng v. Northwest Indian Preservation Ass'n, 485 U.S. 439 (1988). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." Id. Instead, mitigation measures should be supported by analytical data. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998).

Proximity to Ecologically Critical Area

Plaintiffs argue that: the Big Tower Project may impact the Wild and Scenic portion of the North Fork John Day River which supports the largest spawning populations of wild spring chinook and summer steelhead in the Columbia River Basin, and contains healthy populations of Bull Trout and Redband Trout; the Forest Service's determination that the river will not be effected because no logging will take place within the scenic corridor is insufficient to address the increased erosion and sedimentation caused by the project, which will be deposited in streams which flow directly into the North Fork John Day

River; and the North Fork Drainage is used by Rocky Mountain Elk to migrate to their winter range in the Bridge Creek State Wildlife Area.

The court finds that the Forest Service took a "hard look" at the effects of the Big Tower Project on the North Fork John Day River, and the Forest Service's determination that the Big Tower Project would not significantly affect the wild and scenic qualities of the river was not arbitrary and capricious. The Forest Service does not plan to do any harvesting within the scenic river corridor, and the closest timber harvest is approximately a half mile from the river. Specialty reports considered potential impacts from the project on fish populations in the North Fork John Day River. The EA adopted mitigation measures, based on these specialty reports, that are designed to minimize significant impacts on water quality, fish and fish habitat. (AR 1172, 1308-1309, 1547, 1561, 1828, 1846).

The EA has done more than merely list mitigation measures. The mitigation measures contained in the EA are based on specialty reports and BMPs. The Fisheries and Aquatic Species report developed its mitigation measures in consideration of PACFISH, TFEA, the Forest Plan, BMPS, previous mitigation measures used in the Texas EA, and direct observations of the conditions in the project area. The water resources report determined that the project would not reduce stream surface shade or increase stream water temperatures. This report recognized that the North Fork John Day River and Cable Creek were water quality impaired for temperature, and determined that water temperatures were expected to decrease at a faster rate because of revegetation within RHCAs.

Oregon and Washington compared the Forest Service's BMPs with state BMPS, which have been certified by the EPA, and found that the Forest Service's BMPs met or exceeded state requirements. Under Oregon law, an operator who complies with state approved BMPs "shall not be considered in violation of any water quality standards". ORS 527.770. The state approved BMPs set out in the EA contain information on location, effects, and consequences of the use of BMPs. The BMPs are designed to maintain water quality, reduce detrimental impacts on soil, riparian areas, sensitive plants, and downstream water sources, prevent and control erosion and sediment movement, reduce erosion and compaction, minimize erosion and compaction from skid trails, and prevent or reduce detrimental impacts from roads.

The court finds that the Forest Service took a "hard look" at the presence of the Bridge Creek State Wildlife Area and its importance as winter range for elk, and the Forest Service's determination that the Big Tower Project would not significantly effect ecologically critical areas was not arbitrary and capricious. The Wildlife Resource Analysis (AR 1394-1412) acknowledges that Bridge Creek State Wildlife Area is adjacent to the Big Tower Project Area, and that it is an important area for winter range used by elk. The analysis states that the Tower Fire was located in an area that was meeting elk and deer overall population objectives. The analysis relied upon telemetry from ODF&W, which indicated that there was little movement of elk through the Tower Fire analysis area. The analysis finds that: implementation of BMPs, Forest Plan Standards and Guidelines, and incorporation of up to date research will mitigate and reduce potentially significant effects; the proposed salvage harvest will not alter habitat in a way to

effect wildlife populations in and around the analysis area; disturbances to Rocky Mountain elk will not be measurably greater under Alternative 2 than Alternative 1, and the designation of PACFISH RHCAs and implementing snag requirements will help maintain some of the remaining screening cover and habitat connectivity for elk; disturbances to elk from harvest activities are expected to result in temporary displacement of elk during hunting season, but the disturbance are not expected to be markedly different from Alternative 1, since the majority of the harvesting would take place during the normal operating season; concerns regarding habitat connectivity were addressed to some degree through eliminating areas within the Oriental and Texas Bar creek drainages with sensitive soils and high erosion potential, and the designation of PACFISH RHCAs and implementing snag retainment requirements as partial mitigation measures. Plaintiffs have not cited to evidence in the record that demonstrates that the Big Tower Project will significantly effect the Bridge Creek State Wildlife Area.

Highly Controversial

Plaintiffs argue that the effects from the Forest Services' use of tractor logging, entering PACFISH buffers, reducing wildlife cover below minimum Forest Plan standards, and construction of logging roads are highly controversial. Plaintiffs also argue that the Big Tower EA fails to: inform the public of the scientific and widespread support for the position that tractor logging is not the best approach after a wildfire; discuss the findings and conclusion of the Beschta Report; and explain in the Big Tower Project Notice of Decision and FONSI why its chosen scientific approach is not highly uncertain or will involve effects that

are not highly controversial[40]; and address why comments received from ODF&W, the Confederated Tribes of the Umatilla Indian Reservation, eleven conservation organizations, expert testimony from hydrologist Jon Rhodes, and the Big Tower project EA, do not demonstrate that the effects of the project are highly controversial. Federal defendants argue that opposition to the project and difference in scientific opinion do not equate to substantial controversy, and the Forest Service addressed the Beschta report in the Everett report.

"The existence of public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]. A federal action is controversial if a substantial dispute exists as to its size, nature, or effect." Greenpeace Action, 14 F.3d at 1333 (citations and quotations omitted). Controversy does not refer to public opposition to the project. Northwest Environmental Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997). "[A]n EIS is not required when an agency makes a good faith effort to satisfy the concerns of commentators, and, to at least some extent, succeeds." Surfrider Foundation v. Dalton, 989 F.Supp. 1309, 1323 (S.D. Cal. 1998).

The court finds that the Forest Service took a hard look at the controversial nature of the effects of the Big Tower Project, and its conclusion that there was not a

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[40] The Forest Service's failure to follow the Regional Forest Service Director's letter is not subject to judicial review. See Western Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996), cert. denied, _ U.S. _, 117 S.Ct. 80 (1997).

substantial controversy was not arbitrary and capricious. The record contains evidence that the Beschta report was considered in the Everett report. It also appears that the Forest Service followed many of the recommendations in the Everett report, rather than recommendations contained in the Beschta report. The record shows that some of the concerns in the Beschta report, as well as the concerns of ODF&W, and the Confederated tribes were taken into consideration, and the Big Tower Project responded to those concerns.

Forest Service soil scientists reviewed salvage units in the field to determine their suitability for tractor logging. Many of the units had suitable slopes from an erosion standpoint, and it was determined that tractor logging could proceed without unacceptable risk. Other units were dropped or changed to helicopter or skyline logging. (AR 2036).

The EA uses helicopter logging in 1/4 of the area, and no new permanent roads will be constructed. The temporary roads will be built to minimize impacts, and will be obliterated. (AR 984, 997, 1291, 1309) The Forest service will use BMPs to minimize erosion. (AR 997, 1317). Upgrading roads is expected to minimize erosion. (AR 1323). Mitigation measures were designed to avoid adverse impacts on fish and fish habitat. (AR 1177-1178, 1308-1309, 1547-1549). In addition, no logging will take place in RHCAs.

Effects are Uncertain and Involve Unknown Risks

Plaintiffs argue that the potential effects from the project on erosion and sediment delivery are uncertain and involve unknown risks, as evidenced in the TFEA and the

Beschta report; the Forest Service has insufficient information on the effects of erosion from logging burned areas to determine the effects of the Big Tower Project on erosion and sedimentation; and the Forest Service's decision was not fully informed or well-considered. Federal defendants argue that: the Forest Service evaluated the erosion potential in the TFEA based on the Soil Resource Inventory map units and the Burn Intensity Map; the initial units proposed for tractor logging were reviewed by Forest Service soil scientists for erosion potential, and the sites were modified accordingly; past experience logging unburned areas, with similar soil types, showed that large increases in erosion did not occur when BMPs were implemented; the court should defer to the Forest Service's determinations because they involve forecasting in an area where its technical expertise is involved; the Forest Service does not have to employ the best scientific methods; and the Forest Service properly relied on the opinions of its own experts.

An agency must indicate the extent to which environmental effects are uncertain or unknown. Citizens Against Toxic Sprays, Inc. V. Bergland, 428 F.Supp. 908, 922 (D.Oregon 1977). In addition, an agency must address the uncertainties surrounding scientific evidence in a meaningful way. Seattle Audubon Soc. v. Espy, 998 F.2d 699, 704 (9th Cir. 1993). If the court is satisfied that an agency's "exercise of discretion is truly informed, the court must defer to 'th[at] informed discretion.' " Greenpeace Action, 14 F.3d at 377. (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

The court finds that the Forest Service took a hard look at the possibility of uncertain effects of erosion and

sedimentation associated with the salvage logging component of the Big Tower Project. The TFEA states that sedimentation data was not readily available. The Forest Service attempted to measure post-fire erosion by putting boxes in Winom Creek and several smaller tributaries, but the sediment amount was too great to maintain the boxes. The box in Winom Creek filled in a month and others were buried and lost. The TFEA analysis recognized that more comprehensive analysis and interpretation was needed to understand sediment relationships in and downstream of the fire area. (AR 2521).

The Forest Service estimated erosion potential using the Soil Resource Inventory Map and the Burn Intensity Map. (AR 2514). The TFEA states that experience with other fires in the area has shown that, in the absence of extreme climatic events, large-scale erosion should be limited, but it recognizes that the risk of erosion is "quite real". (Id.).

The EA recognizes that timber harvesting is expected to increase erosion, but it also states that past observations of logging unburned areas with these soil types has shown that large increases in erosion do not occur when BMPs are implemented. The Forest Service consulted with the Wenatchee National Forest, which experienced wildfires in 1994, regarding post-fire recovery issues. (AR 839-865). In its appeals decision, the Forest service recognizes that there are differing scientific opinion regarding the effects of post-fire logging. It states that, in addition to consulting with officials from the Wenatchee National Forest on this issue, they also reviewed results from past fires on the North Fork John Day Ranger District and the Wheeler Point Fire Salvage. (AR 1840).

The record contains evidence that the Bescnta report was considered in the Everett report. The Everett report: recognizes that the Beschta report calls for minimal post-fire management, which is a specific viewpoint which should be considered, along with other views from other resource scientists; opines that the Beschta report is biased towards hands-off management; recognizes that much of the scientific information can be conflicting because conditions vary from site to site; points out that other scientists believe that intensive science-based management is more appropriate; discusses the need to seed introduce species on steep slopes following fires to prevent soil erosion; states that there is conflicting information on the subject of post-fire management; discusses soil stability, and finds that letting nature take its course may not be the best post-fire management approach; refers to other scientific literature containing examples of increased soil erosion following salvage logging and accompanying road construction; calls for land managers to balance the costs to salvage timber against the potential costs associated with environmental harms; points out that the Beschta report focuses on the exclusion of salvage logging from sensitive areas as a prelimnary guide; and criticizes the Beschta report's "broad brush approach" of prohibiting logging on sensitive sites; and states that salvage logging should be used as a management tool to achieve biological goals. (AR 577).

Forest Service soil scientists reviewed salvage units in the field to determine their suitability for tractor logging. Many of the units had suitable slopes from an erosion standpoint, and it was determined that tractor logging could proceed without unacceptable risk. Other units were dropped or changed to helicopter or skyline logging. (AR 2036). The

Forest service will use BMPs to minimize erosion. (AR 997, 1317). Upgrading roads is expected to minimize erosion. (AR 1323).

Cumulatively Significant Impacts

Plaintiffs argue that: the Big Tower Project, the Hairy Hazard Tree Project, the Tower Project, the South Tower Project, and the Camas Sale will have significantly cumulative impacts in the form of erosion and sedimentation, which will impact fish habitat and populations and water quality standards, and a decrease in wildlife cover levels; the Forest Service failed to account for the impacts of logging on private lands adjacent to the Tower Fire on fish and wildlife; the Forest Service's evaluation and analysis of the effects of past logging is inadequate; the EA fails to discuss the Turner Otter Salvage Sale; the EA fails to address impacts on wildlife habitat, soil erosion, and sedimentation from the Camas Sale, the Bull Fire, and the Summit Fire; the cumulative impacts analysis for sedimentation and erosion does not disclose past, on going, and reasonably foreseeable actions; the Big Tower EA does not contain any quantified or detailed information or estimates regarding the potential for soil erosion or sedimentation; and the Big Tower Project does not provide a detailed analysis of the potential impacts on wildlife.

Federal defendants argue that: the Big Tower Project EA was based on the Burned Area Report, the specialty reports, and the interdisciplinary team TFEA, and these reports, which took into account the cumulative effects of past, ongoing, and reasonably foreseeable future actions, including the five projects listed by plaintiffs, were available

for review; the Big Tower Project considered the actions taken under the Burned Area Report, the Hairy Hazard project, and the South Tower project; the TFEA was followed in designing the Big Tower Project; the Big Tower Project has been designed and modified to avoid significant adverse impacts on the environment; the Big Tower EA discloses the effects of the proposed logging (AR 1320-1323); the administrative record discusses the Tower Fire, Burned Area Report projects, past timber harvests, existing ORV trails, existing roads, past grazing, the North Fork John Day Dredge Tailings Restoration project, the 96 Roadside Salvage, and the temporary road construction and timber harvest associated with the Big tower project (AR 1317-1318); the TFEA discloses locations of past harvests (AR 2527-2528); sediment associated with the 96 Roadside Salvage and the drege trailing reclamation was discussed in the Soil Productivity/Erosion/Sedimentation section of the Big Tower EA, as were road densities (AR 1318); cumulative impacts on fish populations and habitat were disclosed in the Big Tower Project EA (1322-1323); and the Big Tower EA provides specific information on how the effects on wildlife habitat will be mitigated under Alternative 1's discussion (AR 1329).

Defendant/Intervenors argue that: the Forest Service has adequately addressed cumulative effects of past, present, and reasonably foreseeable future actions by incorporating the TFEA, which encompassed the entire burned area, in the Big Tower EA; the Big Tower EA states that a larger area encompassing the associated subwatersheds was used to analyze the effects on fish, wildlife, and soil resources; this analysis includes information on Cable Creek; when the decision for the Big Tower Project was signed, the South Tower Project was still in the planning stage, and therefore,

its effects did not have to be considered; the effects of the Big Tower Project can be considered in the South Tower project; the environmental analysis for the Camas project was supplemented based on the Big Tower project; since only one percent of the Camas restoration EA project occurs within the Tower Fire Area, the Forest Service properly concluded that it would have minimal effects when combined with the Big Tower project; the Big Tower project EA accounted for the conditions in the Camas watershed in the TFEA; the Forest Service conceded the possibility of additional erosion, but the erosion would be minor when compared to the erosion created by the Big Tower Fire because no new permanent roads will be constructed and temporary roads will be located away from streams; the Forest Service evaluated each tractor harvest unit on highly erosive soils to confirm that slopes were stable enough to support tractor logging, to confirm that unit boundaries avoided high risk areas, and units were modified or eliminated if problems were found (AR 2036); a Forest Soil Scientist visited the tractor units and concurred with the location and modifications of the harvest boundaries (AR 2036, 1551-1552); there would be no significant harm to the bull trout because before the fire, bull trout were absent from the creeks draining the harvest units and the fire killed the fish in these creeks (AR 1173-1174); fish are expected to repopulate the creeks, and mitigation measures are designed to minimize sedimentation (AR 1174-1175, 1437-1441); no harvesting will occur within at least 150 feet of Class I streams (AR 1305); live trees, snags, and wildlife trees will be retained to meet 100% of the cavity nesting wildlife population potential (AR 1308-1309); the Big Tower Project is located in an area where timber harvest is permitted by the Umatilla Forest Plan; the Big Tower Project does not exceed the Plan's permitted level of timber harvest; the Big Tower

Project conforms to the Plan and its EIS; the Plan includes salvage timber as part of its normal sales program; the Plan ackonowledges the risks of catostrophic wildfires; the Tower Fire Salvage and the Hairy Hazard Salvage were small projects with no environmental impacts that were categorically excluded from NEPA; and the Big Tower Project EA contains many mitigation measures for both wildlife and water quality which support a conclusion of nonsignificance (AR 79-167, 1153-1158, 1291, 1308-1309, 1438-1439, 1473).

The court finds that the Forest Service took a "hard look" at the possibility of cumulative impacts from the Big Tower project, and its decision that the Big Tower Project would not cause significantly cumulative impacts was not arbitrary and capricious.[41]

The EA discusses current soil productivity, erosion, and sedimentation, as well as, expected cumulative effects from the Big Tower Project. The EA recognizes that past timber harvests and the Tower Fire have reduced coarse woody debris in the analysis area. (AR 1317). To prevent further reductions, timber salvage would be limited to areas which were less intensively harvested in the past. (Id.). The EA also discusses the cumulative effects of past timber harvests, existing roads and trails, and past grazing on soil erosion. (AR 1318). The EA discusses the cumulative effects of the Roadside sale and future ground-based harvests. (Id.). The EA discusses impacts from past livestock grazing, and plans to prohibit grazing for two years in high mortality

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[41]Issue regarding water quality are discussed in the section regarding potential violations of Oregon's water quality standards.

areas. (Id.). The EA also discusses additional sedimentation from the North Fork John Day Dredge Tailings Restoration Project. (Id.).

The EA contains information on the existing conditions for Fisheries habitat and water quality. (AR 1320). It discusses the cumulative effects of the Big Tower project on these resources. (AR 1322). The EA finds that future road rehabilitation and obliteration projects will reduce road sedimentation effects. (AR 1323). It also recognizes that additional sedimentation is expected from the Roadside Sale, the dredge reclamation project, and livestock grazing and timber management on private lands. (Id.). The EA sets out mitigation measures, based on specialty reports and BMPs, to minimize erosion, sedimentation, and negative effects on wildlife habitat.

The record contains the TFEA, which addressed issues of soil productivity, including potential for erosion, fisheries resources, habitat restoration, fuel loading, salvage, and water quality. (AR 2474-2621). The TFEA contains an estimate of erosion potential using SRI interpretations for surface erosion potential in combination with the Burn Intensity map. (AR 2514). The Forest Service installed bedload boxes on Winom Creek and several smaller tributaries, but found sediment production too great to maintain the boxes. (AR 2521).

The record contains a biological evaluation for proposed, endangered, threatened, and sensitive wildlife species and habitats. (AR 1447). The analysis area covered both National Forest and private lands. (Id.). The analysis describes effect of the Tower Fire on the area. (Id.). The

evaluation assessed the effects of the project on California wolverines, North American Lynx, Northern Bald Eagle, Preble's Shrew, and Townsend's Big-eared bat. (AR 1449). The cumulative effects analysis was based on a 20 year time period before and after the proposed project. (AR 1452). It recognized that past activities, including National Forest and private timber management and associated roads, fragmented and reduced habitat. It listed past timber sales which fragmented habitat in Oriental and Texas Bar creeks. It discussed that those harvests did not provide adequate riparian buffers. The report found that the Big Tower project would have low level effects on habitat compared to the effects of the Tower Fire, and that these effects would be reduced through the designation of leave snags, CWD, and PACFISH RHCAS. The report also found that BMPs and Forest Plan Standards and Guidelines will be implemented so that potentially significant effects would be mitigated and reduced to non-significant levels. (Id.). The report recognized ongoing activities that would add to loss of habitat and disturbances, and found that long-term adverse effects were not expected. The report also took into consideration effects from the Roadside sale, the South Tower project, The Turner/Otter Larch resale, grazing on private and forest service lands, thinning on forest service and private lands, and fire salvage in roadless areas. (AR 1453). The report found that implementation of BMPs and Forest Plan standards and Guidelines would mitigate potentially significant impacts to non-significant levels. (Id.).

The Big Tower EA contains a biological evaluation for aquatic species. (AR 1547). This evaluation finds that the Big Tower Project Alternative 2 is not likely to jeopardize the continued existence or result in destruction or adverse

modification of proposed critical habitat of the Bull Trout. The evaluation recognizes that Bull Trout do not occur in the streams of the project area, but do occur in downstream in the North Fork John Day River seasonally. The evaluation finds that effects of the project would likely be limited to a potential minor reduction in prey base since spawning and juvenile rearing does not occur in these reaches. The evaluation states that alternative 2 may impact individuals or habitat of Redband Trout, Steelhead Trout, and Spring Chinook, but the project is not likely to contribute to a trend toward federal listing or cause a loss of viability to the populations or species. The evaluation recognizes that Spring Chinook do not occur in the project area, but occur in downstream, reaches of Oriental Creek and the North Fork John Day River. The evaluation states that default PACFISH RHCAs would be established, PACFISH standards for timber management would be met, and increased RHCA dimensions in high risk areas and prohibitions of skid trails and roads within RHCAs, as well as other mitigation measures contained in the EA, will provide additional protection.

The Fisheries and Aquatic Species report describes the affected environment and the effects of the EA alternatives on fish and aquatic species and their habitats. (AR 1172). It assessed the current condition of fish species, including the presence of steelhead, rainbow trout, chinook salmon, bull trout, and other fish in the North Fork John Day River. (AR 1173). It recognizes that the John Day River may be subject to downstream effects on water temperature and sediment from Texas Bar and Oriental Creeks. (Id). It also recognizes that Texas Bar and Oriental Creeks have been extensively roaded and harvested. The report recognizes that

Cable Creek was listed as a 303d stream due to habitat modification and summer temperature.

The report states that: the expected increase from erosion and sedimentation from Alternative 2 is not high, but there was some increased risk from alternative 2 in tractor units and skyline units where timber harvest would occur in the RHCAs; any increase in erosion and sedimentation from timber harvest would be in addition to the cumulative effects of the fire and existing roads in the area; road densities, not including existing old roads and skid trails that are not part of the current transportation systems, in Oriental and Texas Bar Creeks was already high; adverse impacts from some roads were identified in previous projects; increases from sediment from roads is more chronic and prolonged, with greater long-term effects on fish; additional road rehabilitation and obliteration projects would reduce long-term effects; a small amount of sediment would be produced from the roadside hazard tree removal and drege tailing reclamation in the North Fork John Day; some impacts from grazing on private lands in Texas Bar and Cable Creeks is expected; and no difference in stream temperature were expected under any of the alternatives.

The report developed mitigation measures "in consideration of PACFISH, the TFEA, the Forest Plan, previous mitigation measures in the Texas EA related to timber harvest in much the same project area, and direct observation of conditions in the project area". The mitigation measures included: RHCA dimensions of 300 feet on each side of Class 1 and 2 fish-bearing streams, 150 feet on each side of Class 3 streams, and 50 feet on Class 4 streams; no skid trails within RHCAs; no new road construction within

300 feet of class 1-3 streams or within 100 feet of class 4 streams; directional felling of trees from outer 150 feet of 300 feet RHCAs; 100 foot no cut buffer for springs, seeps, and wet areas of less than 1 acre; 150 foot no cut buffer for springs, seeps, and wet areas of more than 1 acre; any trees cut in RHCAs to be left on site; no skidding in swales; directionally fell trees out of swales; leave slash and cut materials scattered in swales; implement BMPs; and prevent livestock grazing in moderate and high intensity burn areas for a minimum of 2 years to reduce cumulative effects. These mitigation measures are included in the Big Tower EA. (AR 1308-1309).

At the time of the decision, the Forest Supervisor decided, as a mitigation measure, that harvest could only occur in the outer 50 percent if a fish biologist or hydrologist could determine that resource risks were low enough. (AR 1561). The decision was mitigated again so that no harvest in PACFISH buffer zones was allowed. (AR 1828, 1846).

The Wildlife Resource Analysis (AR 1394-1412) contains mitigation measures that are common to all the alternatives. (AR 1395). The report describes the general status of wildlife habitat after the fire. (AR 1396). It discusses MIS, old growth habitat, other species, special habitats, and TES, and the environmental consequences of the proposed alternatives. (AR 1397-1410). The report states that: loss of cover quantity and quality, caused by drought, insect infestations, and past timber management practices, have fragmented migration routes through the Oriental Basin and Texas Bar Creek; post-fire conditions will favor the Rocky Mountain elk; both summer and winter foraging habitat for the elk is expected to improve because of the fire;

the Tower Fire caused loss of screening and thermal cover, but snags would provide low level screening cover; wildlife disturbances and displacements are expected to increase due to the more open conditions created by the fire and increased human activity in the burned area; and elk calving was very limited in the analysis area. The analysis discusses direct, indirect, and cumulative impacts within the Tower Fire analysis area. The Wildlife analysis used a 20 year time period in determining potential effects from salvage harvesting and reasonably foreseeable future projects. The analysis acknowledges that salvage harvesting would reduce wildlife habitat by removing snags, but it also states that artificial reforestation will initiate the recovery process of long term cover more quickly than the no action alternative.

The cumulative effects analysis examined past timber practices and associated roads on both private and Forest Service lands, and found that cover and foraging resources would be reduced in the short term. It acknowledges that Alternative 2 will provide residual snags and CWD for wildlife, and will provide compensation through artificial reforestation, which will initiate the recovery process quicker and provide for long term cover. The study discusses other activities on private and National Forest lands, and states that long term adverse effects and reductions in species viabilities are not expected. The analysis discusses reasonably foreseeable actions, including the Roadside Project, the South Tower project, thinning, grazing, the Turner Otter Salvage Sale, reforestation, underburning, and potential fire salvage in the roadless area. The analysis finds that the effects of the actions will be time specific and more pronounced early in the recovery process, and will decrease over time. The analysis finds that implementation of BMPs, Forest Plan

Standards and Guidelines, and incorporation of up to date research will mitigate and reduce potentially significant effects. The analysis finds that the proposed salvage harvest will not alter habitat in a way to effect wildlife populations in and around the analysis area. It states that seasonal road and OHV trails restrictions may need to be implemented if found warranted.

The analysis finds that disturbances to Rocky Mountain elk will not be measurably greater under Alternative 2 than Alternative 1, and the designation of PACFISH RHCAs and implementing snag requirements will help maintain some of the remaining screening cover and habitat connectivity for elk. Disturbances to elk from harvest activities are expected to result in temporary displacement of elk during hunting season, but the disturbance are not expected to be markedly different from Alternative 1, since the majority of the harvesting would take place during the normal operating season. The analysis states that concerns regarding habitat connectivity were addressed to some degree through eliminating areas within the Oriental and Texas Bar creek drainages with sensitive soils and high erosion potential, and the designation of PACFISH RHCAs and implementing snag retainment requirements as partial mitigation measures.

Threatened Violation of Other Environmental Laws

Plaintiffs argue that: the EA must contain sufficient data and facts to demonstrate compliance with Oregon's antidegradation policy; to comply with Oregon's antidegradation policy and to meet NEPA requirements, the EA must contain a discussion and analysis of the

antidegradation policy; the EA does not demonstrate compliance with Oregon's antidegradation policy because it fails to analyze or consider whether sediment is related directly or indirectly to causing Cable Creek to be water quality limited for temperature and fish habitat modification or causing the North Fork John Day River to water quality limited for temperature; the Forest Service has failed to develop a water temperature management plan for Cable Creek or the North Fork John Day River; the EA fails to address the turbidity standard for the John Day Basin; the EA fails to disclose the potential number or location of stream crossings, and to analyze and disclose the effects of these crossings; compliance with BMPs does not automatically ensure that applicable state standards are being met; and the decision lacks hard data on sedimentation and erosion to support the conclusion that the Big Tower Project will produce considerably less sediment than the Tower Fire. Federal defendants argue that: the record shows the Big Tower Project will comply with Oregon water quality standards (AR 1567); the issue of water quality was assessed in the water resources report preceding the EA (AR 990-991); BMPs were developed for the Big Tower Project (AR 1153-1158); water quality was assessed in the EA (AR 1297, 1320-1323, 1336); water quality was a key issue in the EA (AR 1560, 1563); compliance with water quality standards was an issue on appeal, and the appeals officer upheld the decision (AR 1826, 1849); proper compliance with state-approved BMPs constitutes compliance with the CWA; the court cannot assume the Forest Service will violate the law; and only monitoring after the fact can establish a violation of water quality standards. Defendant/Intervenors argue that: the Big Tower Project will help water quality gradually recover by planting trees, repairing roads, and removing dead

trees that could reburn at high intensity in a subsequent fire; the Big Tower Project is fully consistent with Oregon's regulatory scheme for forest practices and protection of water quality; the Big Tower Project adopts BMPs that meet or exceed the BMPs of the state forest practice rules; the Forest Service has prepared a comprehensive ecosystem/watershed analysis for the watersheds in the Big Tower area; and a water temperature management plan is not required because the Forest Service is using BMPs, and, by doing so, under ORS 537.770, their actions do not violate state water quality standards.

The CWA requires the Forest Service to comply with state water quality standards, including a state's antidegradation policy. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998); Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 848 (9th Cir. 1987). "Proper implementation of state-approved BMPs will constitute compliance with the Clean Water Act unless water quality monitoring reveals that the BMPs have permitted violation of these water quality standards." Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1424 (9th Cir. 1989), amended, 899 F.2d 1565 (9th Cir. 1990); ORS 537.770. Oregon and Washington compared the Forest Service's BMPs with state BMPS, which have been certified by the EPA, and found that the Forest Service's BMPs met or exceeded state requirements. Since the Forest Service is using state approved BMPs for the Big Tower Project, the Forest Service is deemed to be in compliance with state water quality standards, including the antidegradation policy, unless and until monitoring reveals otherwise.

Temperature management plans are governed by a Memorandum of Understanding between the Forest Service and Oregon's Department of Environmental Quality. OAR 340-41-120(11)(e)(A). Under Oregon's administrative rules, BMPs constitute the surface water temperature management plan for activities covered under the Forest Practices Act. Id. The Forest Service is using BMPs for the Big Tower Project, and these BMPs constitute the temperature management plan for the project.

The court finds that the Forest Service took a hard look at whether the Big Tower project threatens to violate water quality laws, and the Forest Service's determination that the Big Tower Project does not threaten to violate these regulations was not arbitrary and capricious. The Forest Service: assessed water quality issues in the water resources report preceding the EA (AR 990-991); assessed water quality in the EA (AR 1297, 1320-1323, 1336); analyzed stream temperature monitoring information, conditions affecting stream temperature, measures to prevent increases in stream temperature, and measures to lower stream temperature (AR 1000, 2520-2522, 3080); recognized that a more comprehensive analysis and interpretation is to understand sediment relationships in and downstream from the Tower Fire area (2520-2523); recognized that sedimentation could exacerbate temperature increases, and that both Cable Creek and the North Fork John Day River were water quality impaired (AR 3080, 1298, 1322, 1560); developed, adopted, and modified mitigation measures to prevent sedimentation and temperature increases (AR 997, 1000, 1116-1120, 1153-1158, 1291, 1308-1309, 1438-1439, 79-167, 485, 1869, 3080, 1437); anticipated that the amount of sediment produced from the Big Tower project would be

small compared to the amount of sediment produced by the Tower Fire (AR 1317, 1562); attempted to measure the amount of sediment produced by the Tower Fire by placing boxes in Winom Creek and other streams; performed on site evaluations with regard to mitigation measures (AR 1116-1120); plans to reduce stream temperatures through riparian revegetation (AR 1000); performed a field inventory of riparian habitat, woody debris, pool depth, and stream cover (AR 2356, 3082); performed the TFEA which assessed water quality, including temperature (AR 2520-2523); and discussed compliance with the CWA (AR 1336).

This case is clearly distinguishable from Sierra Club v. U.S. Forest Service, 843 F.2d 190 (9th Cir. 1988). In that case, the EA did not mention the impact logging would have on state water quality standards, and there was evidence, in the form of expert opinion, that previous logging in the area had created sufficient turbidity to violate state water quality standards. Id. at 1195. In our case, it is clear that the Forest Service recognized and addressed the issues of temperature and the anticipated effects of sedimentation on stream temperature.

This case is also distinguishable from Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998). In Idaho Sporting Congress, the Forest Service relied upon an expert hydrologists opinion, which in turn was based upon his review of the topography of the area and an out-dated study of a different watershed, in determining that the proposed timber sale would not have a significant effect on water quality and that mitigation measures would prevent such effects. Id. at 1150-1151. In our case, the Big Tower Project does not merely contain a list of mitigation measures

that are unsupported by analysis and data. The mitigation measures and BMPs contained in the EA are based on recent specialty reports in the Tower Fire Analysis area and Forest Service Region 6 BMPs, which were reviewed and approved by the state of Oregon. The Forest Service will conduct monitoring, including water temperature monitoring to ensure that the BMPs are properly implemented. Under Oregon law, the use of BMPs constitutes compliance with state water quality standards, including the state's antidegradation policy.

The specialty reports were based on analysis in the field and other expert opinions and studies. For example, the Fisheries and Aquatic Species report developed its mitigation measures in consideration of PACFISH, TFEA, the Forest Plan, BMPS, previous mitigation measures used in the Texas EA, and direct observations of the conditions in the project area. This is not a case where the Forest Service is relying on out-dated information on a different area or mitigation measures that are not supported by analytical data in making their determinations.

This case is distinguishable from Northwest Indian Cemetery v. Peterson, 795 F.2d 688 (9th Cir. 1986). In that case, the court found that the Forest Service had ignored and failed to disclose the risks to water quality from landslides, and there was no indication that BMPs were to be considered state water quality standards. Id. at 697. In this case, the state has recognized that compliance with state approved BMPs constitutes compliance with state water quality standards. In addition, the Forest Service did not ignore or fail to address the issues of sedimentation and water temperature.

Substantial Questions

Plaintiffs argue that: the EA's discussion and analysis of existing conditions and potential impacts on fish habitat and water quality is inadequate; the EA fails to disclose information regarding the extent and magnitude of past management activities such as the volume of past logging, the actual miles of logging roads, the number of stream crossings by roads, the extent of riparian vegetation loss due to grazing, road construction, and logging; the EA fails to discuss the effects of the Tower Fire, including failure to estimate or predict the likely magnitude of erosion and sediment delivery caused by the fire; the EA fails to disclose the proposed location of logging roads; EA fails to disclose the number and location of roads which will cross streams; EA fails to disclose the number and location of helicopter landings; the EA fails to disclose the perennial streams in which logging will occur inside the recommended PACFISH buffers; the EA fails to disclose the magnitude of the created openings which would result from proposed logging; no data, information, or evidence is provided to explain the effectiveness of mitigation measures or BMPs; no evidence is provided to show BMPs can reduce the impacts of logging, grazing, and road construction at the watershed scale to an ecologically insignificant level; the project would result in further reduction in wildlife habitat through the removal of large diameter trees, snags, and downed material; wildlife screening cover will be reduced; snag levels will be reduced below the levels recommend in the TFEA and PACFISH guidelines; and cover and forage resources will fall below minimum levels required in the Forest Plan.

Federal defendants argue that: this argument is redundant of earlier arguments; the proximity and size of the project are not determinative on the issue of significance; adverse effects from the Big Tower Project have been avoided or minimized; the record shows miles of specific road construction (AR 1291, 1303) and the number of acres proposed for harvest by logging system; logging system specialists developed tentative harvest and transportation plans for the harvest units, which were made available to the interdisciplinary team for use in their analysis and effects reports (AR 866-870, 2227-2291, 1010-1015); relevant facts associated with the logging systems are documented in the Big Tower Logging Feasibility Report (AR 1890-2056); the information contained in the feasibility report was used to describe the effects of the alternatives on soil productivity, erosion, and sedimentation (AR 1314-1319); plaintiffs have failed to cite any authority for the proposition that an EA must contain exact locations of landings and roads; Big Tower Project will comply with water quality standards; Big Tower Project will not affect stream shade, and thus will not affect water temperatures (AR 1174-1175, 1828, 1846); the Big Tower Project is designed to avoid adverse impacts on fish and wildlife (AR 1312-1337, 1177-1178, 1547-1549); Big Tower Project will fully comply with PACFISH (AR 1846, 1828); the Vegetation Report in the TFEA shows the location of established plantation within the Tower Fire, which closely correspond to openings created, and, because of extensive mortality caused by the Tower Fire, a more detailed analysis of created openings was not completed (AR 2689, 2665, 1829); cover for wildlife will be retained in PACFISH RHCAs (AR 1330); snag levels are based on the Forest Plan as amended by the Eastside Screens, and have been adapted to meet habitat conditions following a wildfire

(AR 1308-1309, 524-559, 884-891); snags levels would maintain 100% population potential for woodpeckers and other MIS (AR 1329); pileated woodpeckers and certain other cavity dwellers are not expected to occupy blackened stands (AR 1397, 1403); unmerchantable trees will be left behind to provide additional short-term cover (AR 1330); and screening cover will also be supplied through additional mitigation measures contained in the TFEA and the EA (AR 2652-2656, 1329-1330, 1291, 1313).

As pointed out by defendants, plaintiffs arguments repeat many of their earlier points which have been addressed. The court finds that the Forest Service took a "hard look" at the issue raised by plaintiffs. The TFEA assessed impacts on fish habitat, soil condition, and watershed conditions. (AR 2481, 2514, 2517, 2519, 2521, 2522). The EA also contains information on water quality. (AR 982, 990-991, 997, 1004, 1172-1179, 1297, 1314, 1320-1323, 1336). Before the Forest Service prepared the EA, surveys of the burned area were conducted to assess forest vegetation (AR 2292), trails (AR 2333, range (AR 2336), fish (AR 2356), soils (AR 2368), and sensitive species (AR 2469). The Forest Service used SRI to estimate sediment and erosion. (AR 2514). The Forest Service examined issues of water temperature (AR 1174-1175, 1828, 1846). Mitigation measures were developed to avoid adverse impacts to fish and wildlife. (AR 1312-1337, 1177-1178, 1547-1549). The Big Tower Project will upgrade roads to help eliminate sediment. (AR 1177, 998, 1291, 1323). The Forest Service will use state approved BMPs to minimize erosion and maintain water quality standards. (AR 997, 1317). The record contains extensive information on logging, including miles of specified logging road construction, the number of

acres to be harvested by logging system, tentative harvest and transportation plans, and a logging feasibility report. (AR 866-870, 1303, 1311, 2227-2291, 1890-2056). The Big Tower Project will comply with PACFISH buffers. (AR 1828, 1846). The Forest Service has presented evidence that, due to the magnitude of mortality caused by the Tower Fire, further analysis regarding created openings was deemed unnecessary. (AR 2665, 2689).

The Big Tower Project contains plans for reforestation of 8700 acres which will expedite the return of wildlife cover. (AR 131, 1329-1330). Wildlife cover will be retained in PACFISH RHCAs. (AR 1330). The snags levels in the Big Tower Project will meet amended Forest Plan standards. (AR 524-559, 884-891, 1308-1309). The Forest Service plans to leave unmercantable timber on site to provide short-term cover. (AR 1330). The Forest Service will implement other mitigation measures as well. (AR 2652-2656, 1329-1330, 1313).

Range of Alternatives

Federal defendants argue that: the Forest Service considered a full range of alternatives as required by NEPA - the no action alternative, two action alternatives, and four alternatives that were not considered in detail; and restoration alternative advocated for by plaintiffs was not an appropriate alternative because it would not accomplish one of the goals of the project - salvage logging. Defendant/Intervenors argue that: the Big Tower Project EA contained an adequate range of alternatives by considering seven alternatives, including implementing restoration activities only (AR 1302-1303); the restoration activities only option was considered, but not fully

developed; and the three fully developed alternatives were consistent with the purposes of the project. Plaintiffs have not responded to this argument.

NEPA requires an agency to consider a reasonable range of alternatives. See Prairie Woods Products v. Glickman, 971 F.Supp. 457, 471 (D. Oregon 1997). The range of alternatives is determined by the nature and scope of the project, but the range need not extend beyond alternatives reasonably related to the purposes of the project. The Alliance for Wild Rockies v. U.S.F.S., Civ. No. CV-95-0260-EJL, CV-95-0257-EJL (D.Idaho 1995), affirmed, 1996 U.S. App. Lexis 11591 (9th Cir. 1996)(citations omitted). An agency does not have to consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management area. Prairie Woods, 971 F.Supp. at 471.

The purposes of the Big Tower project are to: remove dead trees before insect levels reach epidemic proportions; eliminate excessive fuel loads; remove dead trees along roads that pose a hazard to the public; and revegetate slopes to provide stream shade and to protect slopes from erosion. (AR 1288-1291). Since salvage harvest is one of the goals of the EA, the Forest Service did not have to consider the restoration only alternative because it would not meet the stated purposes of the project. See City of Angoon v. Hodel, 803 F.2d 1016, 1020-1021 (9th Cir. 1986)(Corps did not have to examine an alternative in detail that would not satisfy the purposes for which a permit was sought), cert. denied, 484 U.S. 870 (1987).

NFMA

Federal defendants argue that the Forest Service complied with NFMA's diversity/viability and monitoring requirements and the Big Tower Project is consistent with the Forest Plan. Plaintiffs have not responded to these arguments.

Plaintiffs allege that the Forest service has failed to ensure the diversity and viability of fish and wildlife species, citing 36 C.F.R. §219.19. "[A] challenge to a Forest Service's district decision is not cognizable under 16 U.S.C. §1604(g) and 36 C.F.R. §219.19 . . . because only challenges to regional guides or forest plans may be brought under those provisions." Environment Now! V. Espy, 877 F.Supp. 1397, 1420 (E.D. Cal. 1994).

In their complaint, plaintiffs allege that the Forest Service has not conducted adequate or accurate monitoring of MIS which may be present and impacted by the Big Tower Project. Monitoring and reporting are not final agency actions subject to judicial review. Ecology Center, Inc. V. U.S. Forest service, CV 96-142-M-LBE (D.Mont. 1997).

In their complaint, plaintiffs allege that the Big Tower project is not consistent with the Umatilla Forest Plan, because it is located in a C-& Special Fish Management Area and it does not comply with Forest plan standards for PACFISH, shade, and soil productivity. Defendants have presented evidence that the Forest service determined that the Big Tower project would be consistent with the Forest Plan if certain amendments were made to the Forest Plan. (AR 1336). Those amendments were made. (AR 1565).

Defendants have presented evidence that PACFISH standards will be met. (AR 1828, 1828, 1846). Defendants have presented evidence that the Big tower EA contains numerous mitigation measures to ensure compliance with Forest Plan provisions. (AR 1309). Defendants have also presented evidence that salvage sales are consistent with the C-& designation. (Forest Plan 4-169). Defendants have presented evidence that no salvage harvesting will occur in RHCAs, and therefore, the Big Tower project will not affect streamside shade and will comply with Forest Plan standards. (AR 1561, 1322). Defendants have presented evidence that the harvest system selected and mitigation measures in the Big Tower project will ensure that Forest plan standards are met with regard to soil productivity. Plaintiffs do not address these arguments or dispute the evidence presented in their memorandum. It appears that the Big Tower project is consistent with the Forest Plan.

Issuance of a Permanent Injunction

In the Ninth Circuit, courts may apply one of two preliminary injunction tests. Ali v. United States, 932 F.Supp. 1206, 1209 (N.D.Cal. 1996). Under the first test, the party must show: 1) irreparable injury; 2) probability of success on the merits; 3) the balance of equities in their favor; and 4) if the public interest is involved, the granting of the injunction is in the public interest. Stanley v. University of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994)(citation omitted). Under the second test, the moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardship tips sharply in their favor. Id. Even if the balance

tips in their favor, they must still show a fair chance of success on the merits. Id. If the balance tips sharply in favor of the plaintiff, less likelihood of success on the merits is required. Wilson v. Watt, 703 F.2d 395, 399 (9th Cir. 1983). In addition, the party must also show an inadequate remedy at law. Stanley, 13 F.3d at 1320. The standards for a permanent injunction are the same as a preliminary injunction, except the moving party must show actual success on the merits, instead of probable success on the merits. Amoco Production Co. V. Village of Gambell, AK, 480 U.S. 531, 546 n. 12 (1987).

"Irreparable harm is injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2nd Cir. 1995). Injunctive relief is appropriate when the moving party demonstrates irreparable harm and inadequacy of legal remedies. Amoco Production Co., 480 U.S. at 542 (citation omitted). The "court must balance the competing claims of injury and must consider the effect on each party the granting or withholding of the requested relief. Id. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. at 545. The court will not issue an injunction if the granting of an injunction "might actually jeopardize natural resources". American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983).

"The court must weigh and consider the public interest in deciding whether to issue an injunction". Seattle Audubon Soc. v. Evans, 771 F.Supp. 1081, 1095 (W.D. Wash.), affirmed, 952 F.2d 297 (9th Cir. 1991)(citations omitted). An administrative agency's failure to comply with the law "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law. Id. at 1096 (citation omitted).

"In determining whether to issue an injunction where statutory violations have occurred, the court must engage in a two-part analysis." Id.(citation omitted). First, the court must determine whether the statute restricts the courts equity jurisdiction; whether the statue would either require or preclude the issuance of an injunction. Id. Second, if there is no limitation, the court must balance the equities to determine the appropriateness of an injunction. Id. If the court finds NEPA violations, an injunction is the appropriate remedy. See Forest Conservation Council v. U.S.F.S., 66 F.3d 1489, 1496 (9th Cir. 1995). However, an injunction should not automatically issue. Id. Instead, defendants should be given an opportunity "to present evidence of unusual circumstances that weigh against the injunction sought, and to present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted." Id. (citations omitted).

Plaintiffs failed to establish actual success on the merits.

Based on the foregoing, the court denied plaintiffs' motion for summary judgment and for permanent injunction, granted plaintiffs' motion to file an overlength brief, and

granted defendants' motion for summary judgment and defendant-intervenors motions for summary judgment.

DATED this 24th day of August, 1998

/s/Ann Aiken
United States District Court Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

BLUE MOUNTAIN BIODIVERSITY PROJECT, et. al.,	)	Case No. CV 98-98-AA
Plaintiffs,	)	ORDER
v.	)	
JEFF BLACKWOOD, in his official capacity as Ssupervisor, Umatilla National Forest; and UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,	)	[U.S. District Court of Oregon Filed July 24, 1998]
Defendants.	)	
and	)	
MALHEUR LUMBER COMPANY, et al.,	)	
Intervenors-Defendants.	)	

AIKEN, Judge

The court having reviewed the submissions by the parties, after conducting a hearing, and the court being fully advised of the matter, the court finds that the plaintiffs have failed to establish actual success on the merits. Therefore, the court hereby denies plaintiffs' motion for summary judgment and permanent injunction (doc #32) and grants plaintiffs' motion to file an over length brief (doc #33). The court hereby grants federal defendants' motion for summary judgment and grants intervenor/ defendants' motion for summary judgment (doc #46). Opinion to follow.

DATED this 24th day of July, 1998.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BLUE MOUNTAIN BIODIVERSITY PROJECT, et al.,	)
Plaintiffs,	)
v.	) Civil No. 98-98-AA
JEFF BLACKWOOD, in his official capacity as Supervisor, Umatilla National Forest, et al.,	) ORDER
Defendants,	)
and	) [U.S. District Court of Oregon Filed Aug. 25, 1998]
MALHEUR LUMBER COMPANY, et al.	)
Intervenors-Defendants.	)

AIKEN, Judge:

Plaintiffs' motion for injunction pending appeal (doc. 61) is denied.

The standard to be applied here is the same for a preliminary injunction: whether plaintiffs have met their burden of demonstrating (1) likelihood of success on the merits of their appeal; (2) imminent threat of irreparable harm; (3) a favorable balance of harms; and (4) a public interest supporting the injunction. Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th Cir. 1996); Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977) (motion for injunction pending appeal to be granted or denied under same standard as motions for preliminary injunction before a district court).

This court has already ruled on the merits of plaintiffs' case and found it did not have merit. See Order dated July 24, 1998 ("the court finds that the plaintiffs have failed to establish actual success on the merits"); and Opinion dated August 24, 1998.

Similarly, because this court found that plaintiffs' claims were without merit, plaintiffs have failed to show imminent harm, irreparable or otherwise, which could justify an injunction pending appeal.

Further, the balance tips in favor of denying the injunction. Plaintiffs have failed to introduce evidence of harm, or of irreparable harm. The federal defendants have introduced evidence of jeopardy to the reforestation effort because of the problems of obtaining an adequate source of seeds and seedlings, harm to the resource in the form of sedimentation and noxious weeds, economic harm to the purchaser as well as to the Forest Service, and a forestalling of the benefits of repair to a permanent road used by the Forest Service and the public.

Finally, the public interest in the Big Tower project favors denying the injunction. The Big Tower Project was intended to focus primarily on salvage in order to recover the most value from burned timber before deterioration greatly reduced timber quality; quick action is necessary to minimize loss. Administrative Record ("A.R.") 1291. Quick action is also important for the reforestation components of the Big Tower Project due to extensive loss of ground cover and lack of natural tree seed sources. A.R. 966, 1291, 2598-2604. See also, Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975) (public interest favored denying the injunction because removing diseased timber would prevent spread of insects, and "absent prompt removal, the timber will be worthless").

Plaintiffs' motion for stay pending appeal is denied.

DATED this 25th day of August 1998.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) DC# CV-98-98-ALA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER
Defendants-Appellees	)[Ninth circuit Court of Appeals Filed Aug. 31, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: O'SCANNLAIN and RYMER,
Circuit Judges

Appellants seek emergency injunctive relief prohibiting logging, roadbuilding, or other ground-disturbing activities in the Dragon, Overlook, and Lone timber sales (the "Big Tower Salvage and Reclamation Project timber sales") on the Umatilla National Forest, pending the disposition of this appeal. Appellants' emergency motion for an injunction pending appeal is denied.

Appellants' motion to expedite briefing and calendaring of the appeal is granted in part.

If they have not done so already, the parties immediately shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties wish to include in the record on appeal.

Appellants' opening brief and excerpts of record shall be filed in this court and served on opposing counsel by September 14, 1998; appellees' answering brief shall be filed in this court and served on opposing counsel by September 28, 1998; and appellants' optional reply brief shall be filed in this court and serve don opposing counsel within seven days after service of appellee's answering brief.

Due to the expedited nature of this appeal, no motions for extension of the time for filing the briefs will be filed or entertained.

The appeal shall be calendared for the week of November 2-6, 1998 in San Francisco.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) DC# CV-98-98-AA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER
Defendants-Appellees	)[Ninth Circuit Court of Appeals Filed Nov. 5, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

During the pendency of this appeal, appellants requested immediate injunctive relief prohibiting logging, roadbuilding, and other ground disturbing activities related to the Dragon, Overlook, and Lone timber sales that comprise the Big Tower Salvage and Revegetation Project ("Big Tower Project") in the Umatilla National Forest in Oregon.

The court has reviewed the briefs and record and has heard argument. It concludes that it will reverse the district court and require the Forest Service to prepare an Environmental Impact Statement (EIS). Accordingly, we grant appellants' motion for an injunction pending appeal, Fed R. App. P. 8(a), to forthwith halt all logging, road building and other ground disturbing activities within the Tower Fire area of the Umatilla National Forest until further order of the court. An opinion will follow.

---

1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783
	) D.C. No. CV-98-98-AA
Plaintiffs-Appellants,	) Oregon (Portland)
vs.	)
JEFF BLACKWOOD, et al.,	) ORDER OF CLARIFICATION
Defendants-Appellees	)[Ninth Circuit) Court of Appeals) Filed Nov. 10, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

Defendants and intervenors request clarification of this Court's November 5, 1998 Order "halt[ing] all logging, roadbuilding, and other ground disturbing activities within the Tower fire area of the Umatilla National Forest until further order of this court." We clarify the Order to this extent: the Order does not prohibit road maintenance, water bar installation, ditch and culvert clearing, or other erosion-prevention measures "designed to put the roads to bed for the winter;" nor does the Order prohibit hunting or other recreational activities except in such areas and to such extent that the U.S. Forest Service determines, in its discretion, that defendants'-intervenors' logging activities have created erosion or erosion-inducing conditions that would be exacerbated by such activities.

---

1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLUE MOUNTAIN BIODIVERSITY, et al.	) No. 98-35783)) D.C. No. CV-98-98-AA
Plaintiffs-Appellants,	)
vs.	)
JEFF BLACKWOOD, et al.,	) SECOND ORDER OF) CLARIFICATION
Defendants-Appellees	)[Ninth Circuit Court) of Appeals) Filed Dec. 3, 1998]
MALHEUR LUMBER, et al.,	)
Intervenors-Defendants/Appellees.	)

Before: FLETCHER and TASHIMA,
Circuit Judges, and
FITZGERALD,[1] District Judge

On November 27, 1998, Plaintiffs filed a "Notice to Court of Probable Violations of Court's Orders of November 5th and 10th, 1998, describing a disagreement over the scope of this Court's injunction issued November 5, 1998, as clarified on November 10, 1998. We treat the "Notice" as a motion for further clarification.

When defendants and intervenors requested clarification of this Court's November 5, 1998 Order "halt[ing] all logging, roadbuilding, and other ground disturbing activities within the Tower Fire Area of the Emptily National Forest until further order of this court," they expressly listed the activities, including the removal of logs already down," that they requested permission to continue. We clarified the November 5th order by stating that the Order did not prohibit erosion-prevention measures "designed to put the roads to bed for the winter," or recreational activities that would not exacerbate erosion. The Order of Clarification did not exclude hauling downed logs from the scope of the injunction. Hauling of downed logs is not permitted under the injunction.

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1 Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

NATIONAL ENVIRONMENTAL POLICY ACT

43 U.S.C. §§ 4331, 4332

Sec. 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may-

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

43 U.S.C. § 4332

Sec. 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State
agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in

restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS

40 C.F.R. §§ 1501.4, 1508.9, 1508.25, 1508.27

Sec. 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in Sec. 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (Sec. 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by Sec. 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (Sec. 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (Sec. 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in Sec. 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under Sec. 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to Sec. 1507.3, or

(ii) The nature of the proposed action is one without precedent.

* * *

Sec. 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

* * *

Sec. 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

* * *

Sec. 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Supreme Court, U.S.
FILED
APR 1 1999
OFFICE OF THE CLERK

No. 98-1467

In The

Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,

Petitioners,

and

JEFF BLACKWOOD, et al.,

v.

BLUE MOUNTAINS BIODIVERSITY PROJECT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL AXLINE
Counsel of Record
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
(541) 485-2471

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The Petitioner, a coalition of private timber companies, asks the Court to review the procedural obligations of a federal agency under the National Environmental Policy Act ("NEPA"). The underlying case involves a fact-specific challenge of the failure of the United States Forest Service to prepare an Environmental Impact Statement ("EIS") for an extensive logging project on the Umatilla National Forest.[1] The NEPA dispute raises no conflict between the circuits, does not conflict with any of this Court's precedent, and presents no important legal issues that have not already been addressed by this Court.[2]

In 1996, the Tower wildfire swept across 50,000 acres of forest. In its immediate aftermath, the Forest Service developed a comprehensive "fire recovery strategy," most

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[1] The logging project is within the North Fork John Day Ranger District of the Umatilla National Forest, located in Northeast Oregon.

[2] This Court has had the opportunity to address the primary legal requirements and procedural obligations of NEPA. *See Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Weinberger v. Catholic Action of Haw*, 454 U.S. 139 (1981); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).

of which involved logging the trees that survived the fire. The strategy included five timber sales, with Big Tower the largest and concentrated within the most severe burn area. Cumulatively, Big Tower, 96 Roadside Salvage, Tower Fire Salvage, South Tower, and Cable were developed to log approximately 50 million board feet of timber from the Tower Fire area. Instead of preparing a comprehensive EIS to analyze the overall impacts of the intense wildfire and subsequent logging strategy, the Forest Service made the deliberate decision to break its plan into multiple, individual logging projects, to be addressed separately in less-detailed Environmental Assessments (EAs) and Categorical Exclusions. The explicit rationale of the agency was to speed up the NEPA process and ensure that some projects would proceed in the event others became "snagged in appeals and/or litigation." Because this approach flies in the face of numerous NEPA requirements, Respondents filed suit in federal court.

The Ninth Circuit agreed with Respondents that because multiple logging projects were developed as part of a comprehensive forest recovery strategy, a single EIS was required to address the cumulative effects of the proposed timber sales. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998). In addition, the Ninth Circuit agreed that the EA prepared for the individual Big Tower project was wholly inadequate to support the Forest Service contention that no significant impacts would occur. *Blue Mountains*, 161 F.3d at 1213 ("[t]he Big Tower EA simply fails to persuade that no significant impacts would result from the Big Tower project"). The lack of information and analysis in the EA

raised substantial questions about the potential environmental impacts of the logging proposal, and an EIS was therefore ordered.

ARGUMENT

I. The Issues In This Case Are Not Sufficiently Important To Warrant The Court's Review

The Petitioners suggest that the requirements for post-fire salvage logging projects are of "great public importance" and should therefore perhaps be distinguished from the standard NEPA case. *See* Pet. at 6-7. This opinion is apparently not shared by the Forest Service, as the argument was not presented below and the agency has not sought further review.[3] As it stands, the economically injured timber companies are the only party attempting to keep this dispute alive.[4] Potential concerns of the Forest Service are most likely alleviated through

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[3] The Forest Service did not seek a rehearing before the Ninth Circuit.

[4] At a minimum, this Court should look warily at an outside, financially interested intervenor seeking to raise issues involving the procedural duties of federal agencies under NEPA. While a purely financially interested party is often allowed into NEPA litigation to present concerns at the injunction stage, the courts have considered the federal agency charged with compliance to be the only proper defendant to address NEPA's procedural obligations. *See Portland Audubon Society v. Hodel*, 866 F.2d 302, 308-09 (9th Cir. 1989), *cert.denied*, 492 U.S. 911 (1989); *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993); *see also, Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

existing regulations that provide the agency with alternative avenues in emergency and unusual circumstances. *See* 40 C.F.R. § 1506.11 ("[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the Council about alternative arrangements"); 36 C.F.R. § 215.10(d).

Instead of complying with the standard NEPA procedures or pursuing existing alternative arrangements, the Forest Service chose in this case to collide head-on with the NEPA regulations. As recognized by the Ninth Circuit, the agency made the deliberate decision to divide its post-fire logging strategy into multiple NEPA projects to "allow some projects to move forward if other projects get snagged in appeals and/or litigation." *Blue Mountains*, 161 F.3d at 1215, n. 6. Because the NEPA regulations do not allow the agency to avoid an EIS by purposefully breaking down a project into small component parts, 40 C.F.R. § 1508.27(b)(7), the Ninth Circuit imposed the "'snag' that the Forest Service feared but the law requires." *Blue Mountains*, 161 F.3d at 1215. NEPA requires that the agency analyze the combined effects of its several planned salvage sales, as they are in the same watershed and developed as part of a coordinated fire recovery strategy. *Id.* at 1216; 40 C.F.R. § 1508.25(a).

II. The Court Should Decline Review Because The Decision Is Not Contrary To Supreme Court Precedent

Discounting the strong factual differences, the Petitioner asserts that the *Blue Mountains* decision is inconsistent with *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). *See* Pet. at 7. In *Kleppe*, the plaintiffs sought an EIS to address the overall impacts of coal development across four separate states of the Northern Great Plains region. 427 U.S. at 395-96. The Court found no evidence in the record of a regional proposal or comprehensive federal plan for the development of the Northern Great Plains region, and therefore, no regional EIS was required. *Id.*, at 400-08.

In *Blue Mountains*, the Ninth Circuit cited *Kleppe v. Sierra Club* in recognition that the agency is entitled to discretion in identifying the geographical range of its cumulative effects analysis. *Blue Mountains*, 161 F.3d at 1215. However, unlike *Kleppe*, the federal agency in *Blue Mountains* specifically chose to develop a comprehensive strategy for the analysis area.

> As part of its Tower Fire recovery strategy, the Forest Service identified five potential logging projects in the same watershed, including the Big Tower project at issue in this appeal. Together, the sales would yield 40 – 55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes . . . In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower EA was completed.

161 F.3d at 1215.

Because the Forest Service developed a comprehensive strategy for the Tower Fire analysis area, NEPA required a comprehensive EIS. 40 C.F.R. § 1508.25(a); *see Blue Mountains*, 161 F.3d at 1215 ("[r]elying on the Forest Service's own acknowledgment that the five sales are part of a coordinated Tower Fire recovery strategy, BMBP argues that the Forest Service should have evaluated the cumulative impacts of these sales in a single EIS. We agree."). This fully comports with the teachings of *Kleppe v. Sierra Club;*

> [w]e begin by stating our general agreement with respondents' basic premise that § 102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time . . . when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

427 U.S. at 409-410. Nowhere in the NEPA regulations or *Kleppe v. Sierra Club* is the agency allowed to break a comprehensive strategy for the same area into component parts to be analyzed individually, without addressing the overall, collective impacts. *See* 40 C.F.R. § 1508.27(b)(7). The case at bar therefore in no way conflicts with *Kleppe*, but is in fact perfectly consistent with it.

III. The Court Should Decline Review Because The Petitioner Has Identified No Conflict In The Circuits

As the Petitioners acknowledge, there is no intercircuit conflict concerning the distinction between an EIS and EA. *See* Pet. at 13. The Ninth Circuit has long recognized and understood the difference. *See Foundation for North Am. Wild Sheep v. U.S. Dept. of Ag.*, 681 F.2d 1172, 1178 (9th Cir. 1982) ("[t]he purpose of this EA was to determine whether an EIS was required, to facilitate preparation of an EIS if necessary, and to aid the Service in complying with NEPA if no EIS was required"); *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) ("[i]f the agency finds, based on a less formal and less rigorous 'environmental assessment,' that the proposed action will not significantly affect the environment, the agency can issue a Finding Of No Significant Impact (FONSI) in lieu of an EIS"); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1148 (9th Cir. 1998) ("the Forest Service did not prepare an Environmental Impact Statement ('EIS') preparing instead a less detailed Environmental Assessment ('EA')"); *Save the Yaak Committee v. Block*, 840 F.2d 714, 717-720 (9th Cir. 1988).

In *Blue Mountains*, the Ninth Circuit correctly stated when an EA should be prepared under NEPA. 161 F.3d at 1212 ("an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS"). The Ninth Circuit also correctly defined an EA. *Id.* ("[a]n EA is a 'concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact").

And the Ninth Circuit set forth its long-standing test for when an EIS must be prepared, which is in full agreement with the other circuits. *Id.* ("[a]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor' "); *see also, National Audubon Society v. Hoffman*, 132 F.3d 7, 18 (2nd Cir. 1997) ("a party challenging the agency's decision not to prepare an EIS must show only that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact"); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974).

The Ninth Circuit in *Blue Mountains* was presented with a Forest Service proposal to build eleven miles of roads, log with tractors, and remove approximately 6,000 logging truckloads of trees from an environmentally sensitive area. 161 F.3d at 1210. The agency declared there would be no significant impact, but failed to address or adhere to the recommendations of the leading scientific report on post-fire salvage logging, despite explicit Regional direction to consider the report. *Blue Mountains*, 161 F.3d at 1213. In addition, the Big Tower EA provided no documentation of the estimated sediment that would result from the logging and road building activities, even though the proposal included substantial tractor logging on steep slopes and sensitive soils. *Id.* And the EA failed to consider the combined impacts of the 1996 wildfire along with the multiple proposed timber sales. *Id.*, at 1213-1215 ("[n]o document explores the collective impact of these projects"). Because substantial questions

remained concerning whether the logging proposal may cause a significant degradation of some environmental factor, the Ninth Circuit followed the appropriate standard and ordered an EIS to be prepared. *Id.*, at 1213-14.[5]

Contrary to the fears of the Petitioners, there is no reason to suggest that the *Blue Mountains* decision will "bring the workings of federal agencies such as the Forest Service to a screeching halt due to time, budgetary and energy constraints." Pet. at 13-14. If there were any chance of this occurrence, surely the Forest Service would have joined in the petition. As it stands, the only party seeking review are the timber companies with a purely financial interest in the few trees that remain standing. *See Blue Mountains*, 161 F.3d at 1215.[6]

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[5] The fact that the Forest Service was unable to analyze all potential impacts of its multiple and substantial logging proposals within a concise EA is not an indication that the EA requirement is too stringent, but rather a strong indication that the agency should have chosen to undertake an EIS in the first place. *See* 46 Fed.Reg. 18026, 18037 (March 23, 1981) (the Council on Environmental Quality has advised agencies that an EA should be no more than 10-15 pages, and that in most cases, a lengthy EA indicates that an EIS is needed).

[6] As recognized by the Ninth Circuit, had the Forest Service fully complied with NEPA's requirements, it still had sufficient time to react and conduct logging in the Big Tower area.

> Our decision does not jeopardize the Forest Service's ability to undertake emergency measures in the wake of a disaster. Here, the catastrophic fire burned in August of 1996. The logging began in August of 1998. The Forest Service had ample opportunity and an obligation to undertake a more searching

CONCLUSION

This case presents no conflict between circuits, does not run counter to this Court's precedent, and the private timber companies have presented no reason for the Court to revisit its past NEPA decisions. Respondents respectfully request that the timber companies' petition be denied.

Respectfully submitted,

MICHAEL AXLINE
Counsel of Record
WESTERN ENVIRONMENTAL LAW CENTER
1216 Lincoln Street
Eugene, Oregon 97401
(541) 485-2471

Counsel for Respondents

Dated: April 1, 1999

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environmental review or to propose activities on a much smaller scale.

Blue Mountains, 161 F.3d at 1216.

(5)

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No. 98-1467

In the Supreme Court of the United States

MALHEUR LUMBER COMPANY, ET AL., PETITIONERS

v.

BLUE MOUNTAINS BIODIVERSITY PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
MICHAEL K. MARTIN
ROBERT L. KLARQUIST
ELLEN J. DURKEE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1218

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an Environmental Assessment prepared by the Forest Service was deficient because it failed to analyze the likely cumulative effects of the proposed action in combination with other reasonably foreseeable actions in the same vicinity.

2. Whether the court of appeals improperly required the Forest Service, in preparing its Environmental Assessment, to include a level of detail in excess of that called for by the National Environmental Policy Act and implementing regulations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 161 F.3d 1208. The opinion of the district court (Pet. App. A21-A98) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1998. The petition for a writ of certiorari was filed on March 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to fire-salvage timber harvests and revegetation efforts, collectively known as

the Big Tower Salvage and Revegetation Project (Big Tower Project), in the Umatilla National Forest in eastern Oregon. The district court upheld the Forest Service's decision approving the Big Tower Project. Pet. App. A21-A98. The court of appeals reversed and remanded with instructions that the agency prepare an Environmental Impact Statement. *Id.* at A1-A20.

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires a federal agency to prepare an Environmental Impact Statement (EIS) if the agency proposes to undertake a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). In many instances, to determine whether a proposed action would have a significant environmental impact, the agency prepares an analysis known as an Environmental Assessment. 40 C.F.R. 1501.4(b), 1508.9.[1] The Environmental Assessment is expected to be a brief and concise document containing sufficient evidence and analysis for the agency to determine whether to prepare an EIS or to issue a finding of no significant impact. 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13.

2. In August 1996, a wildfire known as the Tower Fire swept through approximately 51,000 acres of the Umatilla National Forest. By September 1996, the Forest Service had completed a report on the burned area. The report was based on specialty reports evaluating the fire's impact on various forest resources, including vegetation, recreation, fish, and wildlife, and it recommended emergency actions. Pet. App. A23-A25.

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[1] The Council on Environmental Quality, which was created by NEPA, has issued regulations governing compliance with that statute. 40 C.F.R. 1500.1 *et seq.*

In late 1996, the Forest Service developed a forest-wide recovery strategy addressing numerous fires, including the Tower Fire, that had occurred in the Forest during that year. Pet. App. A25. In 1997, the Forest Service developed a second strategy that focused on three major fires, including the Tower Fire, that had occurred in the North Fork John Day District. *Id.* at A29. Those strategies identified five potential logging projects in the North Fork John Day watershed, including the Big Tower Project that is at issue in this appeal. See *id.* at A5, A25.

The Big Tower Project involves three timber sales totaling approximately 4200 acres. Pet. App. A5, A34. The Project also involves construction of temporary roads to provide access to the sites, tree planting on the 4200-acre area once the trees are harvested, planting of trees on an additional 4500 acres, and reconstruction of seven miles of a permanent road. *Id.* at A34-A35. The particular area for salvage harvest was selected because it contained the largest volume of high-value Ponderosa Pine saw timber and because the chances of natural regeneration were poor due to the loss of mature seed trees. *Id.* at A35. The environmental effects of the Big Tower Project were evaluated through a project-specific Environmental Assessment, which concluded with a finding of no significant impact. *Id.* at A6, A35-A36; see also *id.* at A35-A50 (district court opinion details contents of Environmental Assessment).

3. The plaintiffs in this case (respondents in this Court) are the Blue Mountains Biodiversity Project and three other environmental organizations. Pet. App. A4. After bringing an unsuccessful administrative challenge to the Big Tower Project, the plaintiffs filed suit in federal district court, alleging that the Forest Service's

approval of the Project violated NEPA and other environmental laws. *Id.* at A22-A23. Petitioners, which are timber companies and a timber trade association, intervened as defendants. On cross-motions for summary judgment, the district court entered judgment for the defendants. See *id.* at A21-A98. The court held, *inter alia*, that the Forest Service's approval of the Big Tower Project complied with NEPA and regulations promulgated thereunder. See *id.* at A53-A62.

4. Plaintiffs appealed and sought an emergency injunction pending appeal. The district court (Pet. App. A101-A103) and the court of appeals (*id.* at A104-A105) denied emergency injunctive relief. Logging began on the sales in August 1998, and by the date of oral argument in the court of appeals more than 80% of the trees in the Big Tower Project had been felled and removed. *Id.* at A7. Immediately after oral argument, however, the court of appeals entered an order granting the plaintiffs' motion for an injunction pending appeal. *Id.* at A106-A107. The order stated that an opinion reversing the judgment of the district court would follow. *Id.* at A107.[2]

Approximately one month later, the court of appeals issued an opinion reversing the judgment of the district court on the NEPA claims. Pet. App. A1-A20. The court found that the Environmental Assessment "fails to persuade that no significant impacts would result

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[2] The Forest Service and timber company defendants were ordered to halt all logging, road-building, and other ground-disturbing activities within the Tower Fire area until further order of the court. Pet. App. A106-A107. On the defendants' motion, the court clarified its order, stating that it did not prohibit road maintenance, erosion-prevention measures, and hunting or recreational activities. *Id.* at A108-A109. As further clarified, the court's order prohibited the hauling of downed logs. *Id.* at A110-A111.

from the Big Tower project." *Id.* at A12. The court faulted the Environmental Assessment for failing to document the estimated impact from sediment that would result from logging and road-building and for inadequately discussing mitigation measures. *Id.* at A8-A15. The court of appeals further held that the Environmental Assessment was deficient because it failed to evaluate the cumulative impacts of the Big Tower sales combined with other salvage sales proposed for the Tower Fire area, all of which were developed in the coordinated fire recovery strategy. *Id.* at A16-A19. The court of appeals remanded the case to the district court "with instructions that the Forest Service prepare an EIS." *Id.* at A4.[3]

ARGUMENT

Although we believe that the court of appeals erred in its choice of remedy in this case, we do not believe that the court's decision raises a significant question of law warranting this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioners challenge (Pet. 7-10) the court of appeals' holding that the Forest Service had failed adequately to consider the cumulative impacts of the Big Tower Project in combination with other planned

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[3] The court ordered that the existing injunction, as clarified (see note 2, *supra*), would remain in full force and effect until the Forest Service had satisfied its NEPA obligations. The Forest Service subsequently filed an unopposed motion to modify the injunction to allow planting of seedlings and seed ground cover, and removal of "decked" logs, *i.e.*, stacked fallen logs lying adjacent to roads. In an order dated March 23, 1999, the court of appeals clarified that its order does not prohibit planting of trees or seed cover. See 3/23/99 Order 2. The court indicated that the district court could entertain a motion with respect to the removal of the log decks. *Ibid.*

logging activities. Petitioners construe the court of appeals' opinion to "require[] that the Forest Service propose all conceivable actions in a vast area burned by a wildfire in the same environmental document." Pet. 7. In our view, petitioners considerably overstate the breadth of the court of appeals' holding. The court did not require federal agencies to generate comprehensive NEPA documents covering every "conceivable" activity in a particular geographic area. Rather, the court in conducting its cumulative impacts analysis drew heavily upon the facts of this case. The court explained that

> all of the proposed sales were reasonably foreseeable. They were developed as part of a comprehensive forest recovery strategy. In fact, all five sales were disclosed by name to a coalition of logging companies, along with estimated sale quantities and timelines even before the Big Tower [Environmental Assessment] was completed.

Pet. App. A17; see also 40 C.F.R. 1508.7, 1508.27(b) (7) (both quoted at Pet. App. A16); 40 C.F.R. 1508.25(a) (2).

Kleppe v. *Sierra Club*, 427 U.S. 390 (1976), does not compel a contrary result. The Court in *Kleppe* held that an EIS is not required until an agency proposes an action, and that "the mere 'contemplation' of certain action is not sufficient to require an impact statement." *Id.* at 404. The Court explained that "[a] court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared*." *Id.* at 406. In the present case, however, the Big Tower Project had unquestionably been proposed at the time this suit was filed. The question is not whether an

Environmental Assessment of the Big Tower Project was required at all, but whether the Forest Service in preparing that document was obligated to consider the likely cumulative impacts of other timber harvesting activities that formed part of a comprehensive forest recovery strategy. *Kleppe* does not resolve that issue. Furthermore, the Court's decision in *Kleppe* was issued in 1976, some two years before the Council on Environmental Quality issued its initial regulations to implement NEPA. 43 Fed. Reg. 55,990 (1978).[4]

2. The court of appeals erred in its choice of remedy. Upon finding the Forest Service's NEPA analysis inadequate, the proper course was for the court to remand the case to the agency to redetermine the significance of the proposal in light of the cumulative impacts of the Big Tower Project with the other projects that were part of the same recovery strategy. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (where a reviewing court concludes that an agency's analysis is defective, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). Instead, the court of appeals effectively arrogated the significance determination to itself, remanding the case

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[4] Moreover, the court of appeals' analysis of the "cumulative impacts" issue was one of two independent bases on which the court held the Environmental Assessment to be deficient. The court also held that the Forest Service had failed adequately to consider the potential environmental consequences of the Big Tower Project standing alone. Pet. App. A8-A15; see *id.* at A12 ("The Big Tower [Environmental Assessment] simply fails to persuade that no significant impacts would result from the Big Tower project."). For the reasons stated at pages 8-9, *infra*, that fact-specific holding does not warrant this Court's review.

"with instructions that the Forest Service prepare an EIS." Pet. App. A4; see also *id.* at A20.

Petitioners have not sought review of that aspect of the court of appeals' decision, however, and the remedial issue is not fairly included within the questions presented in the petition. In any event, the remedial question is not the subject of any widespread disagreement among the courts of appeals. In other cases, the Ninth Circuit has recognized that the proper remedy in this circumstance is to remand to the agency to redetermine whether an EIS should be prepared. See, *e.g.*, *Jones* v. *Gordon*, 792 F.2d 821, 829 (1986); *Steamboaters* v. *FERC*, 759 F.2d 1382, 1394 (1985). Other courts of appeals have reached the same conclusion. See, *e.g.*, *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 18-19 (2d Cir. 1997); *Fritiofson* v. *Alexander*, 772 F.2d 1225, 1248 (5th Cir. 1985); *Foundation on Econ. Trends* v. *Heckler*, 756 F.2d 143, 154-155 (D.C. Cir. 1985).

3. Petitioners argue (Pet. 10) that the court of appeals required an unwarranted level of detail to be contained in an Environmental Assessment, and that this Court's review is needed to clarify the proper scope of such a document. Contrary to petitioners' apparent assumption, we do not believe that the court of appeals purported to issue any broad pronouncement concerning the content or degree of detail required for an adequate Environmental Assessment. Thus, while we agree with petitioners (see Pet. 5, 12-13) that Environmental Assessments are expected to be more concise than Environmental Impact Statements, we do not understand the court of appeals' opinion to question that principle. Rather, the court of appeals' scrutiny of the Big Tower Project Environmental Assessment

involved a fact-specific analysis that does not warrant this Court's review.

4. Petitioners contend (Pet. 6-7) that post-wildfire environmental analysis presents issues of great public importance. While we agree generally with that assessment, we do not believe that the court of appeals' decision in this case will significantly affect the Forest Service's ability to respond quickly and effectively to such emergencies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
MICHAEL K. MARTIN
ROBERT L. KLARQUIST
ELLEN J. DURKEE
Attorneys

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In the Supreme Court of the United States

October Term, 1998

MALHEUR LUMBER COMPANY, et al.,
Petitioners,
and
JEFF BLACKWOOD, et al.,
v.
BLUE MOUNTAINS BIODIVERSITY
PROJECT, et al.,
Respondents.

Reply in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Michael E. Haglund
Counsel of Record
HAGLUND, KIRTLEY,
KELLEY & HORNGREN, LLP
101 SW Main, Suite 1800
Portland, Oregon 97204
Telephone: (503) 225-0777

May 1999

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STATEMENT REGARDING CORPORATE STATUS

Pursuant to Supreme Court Rule 29.6, a statement, explaining the corporate status of petitioners was previously filed with the Petition for Writ of Certiorari and there has been no change in corporate status since the petition was filed.

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INTRODUCTION

In Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), Appendix A-1, the Ninth Circuit again set unwarranted, heightened standards for environmental analysis that are found neither in the National Environmental Policy Act ("NEPA") nor the Council on Environmental Quality ("CEQ") regulations. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-53 (1989) (NEPA has no requirement that an agency prepare a mitigation plan); see, e.g., Amoco Production Co. v. Village of Gambel, 480 U.S. 531 (1987) (no automatic injunction for violation of environmental statutes).

THE NINTH CIRCUIT'S NEW NEPA STANDARDS

1. A Court May Consider Only Hard Data in the EA and Cannot Look to the Administrative Record.

First, the Ninth Circuit has created a new NEPA standard requiring that "hard data" supporting an agency's opinion be found in the environmental assessment ("EA") itself. An agency, however, should be able to rely on the administrative record in support of NEPA decisions, particularly when modern-day environmental analysis entails a large volume of information.[1]

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[1] In this case, the administrative record contains more than 3,000 pages. Essentially, the Ninth Circuit's decision mandates that every page of the administrative record be referenced in the EA if the agency relied upon it to support its decision.

In the one case decided within the Circuit since Blue Mountains, a district court followed the Ninth Circuit's new "hard data" standard to invalidate an environmental assessment. In Idaho Sporting Congress v. Rittenhouse, Civ. No. 98-0303-S-BLW (D. Idaho Feb. 25, 1999), the district court applied the new standard enunciated in Blue Mountains explaining that "[t]he Ninth Circuit has held that hard data supporting the experts' opinions must be either (1) found in the EA itself, or (2) contained in the administrative record and referred to by the EA." Petitioners' Appendix Supplement A-124, A-130. The court rejected a Forest Service expert's conclusion that timber salvage of dead and dying trees was necessary because of high insect populations. Even though the expert collected field data about insect populations, the court held the EA was insufficient under Blue Mountains unless the field data collection forms were included in the EA or specifically referenced in the EA. Id.

Similarly, in Blue Mountains, the Forest Service staff attempted, but were unable, to collect sedimentation data and instead estimated erosion potential using soil hazard maps and a soil scientist's on-the-ground review of proposed harvest units. A-43, A-71. Although the hard data was not in the EA, the administrative record contained the soil hazard maps and also the soil scientist's report on his field examination. That report explained his conclusions to delete certain harvest units and require low impact helicopters to remove logs on other harvest units. A-43, A-71 to A-72.

The Ninth Circuit's blinders approach, requiring that review not extend to the whole record but be limited to the EA and only those parts of the record referenced in the EA, leads to absurd results. For example, the Ninth Circuit

criticized the Forest Service conclusion that best management practices would reduce erosion from logging and road building in the Big Tower fire area, because the conclusion supposedly was based on observations of logging on unburned areas, and also because nothing in the EA supported the effectiveness of mitigation measures. A-14. In contrast, the district court reviewed both the EA and the administrative record and found that the Forest Service consulted with a sister forest which had experienced large wildfires and, more particularly, had reviewed the efficacy of best management practices to prevent sedimentation that were applied on salvage sales following wildfires in the same national forest and ranger district as the Big Tower Fire. A-71. In short, the very record that the Ninth Circuit refused to examine contained the allegedly-missing support for the agency's decision.

The Blue Mountains decision eviscerates the judicial doctrine of deference to agency expertise. In fact, the CEQ has emphasized that the EA need not contain the hard data demanded by the Ninth Circuit in Blue Mountains. The CEQ published its responses to the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations," including the question, "How long and detailed must an environmental assessment ("EA") be?" 46 Fed. Reg. 18026 (March 23, 1981). The response is telling: "Since an EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered." Id. at 18037 (emphasis added).

Respondents Blue Mountains Biodiversity Project, et al. ("Blue Mountains") urges the Court to deny the writ because the "underlying case involves a fact-specific

challenge." Blue Mountains Resp. Br. at 1. However, the Court need not engage in a fact-bound inquiry to decide whether an EA must include or specifically reference the hard data relied upon by an agency.

2. The Agency Cannot Contemplate Actions in the Same Geographic Area, but Must Propose all Actions at Once.

Second, the Ninth Circuit has created a new NEPA standard requiring the agency to transform contemplated actions into proposals if the actions are in the same geographic area. Although the Ninth Circuit and respondent contend the Court of Appeals followed this Court's decision in Kleppe v. Sierra Club, 427 U.S. 390 (1976), a careful review shows otherwise. Certainly, the Forest Service violated this Supreme Court precedent if it excluded pending proposals from the environmental document. However, neither respondent nor the Ninth Circuit point to any evidence to support the position that five proposed projects existed when the Big Tower Project was proposed. Although five projects were contemplated in the early post-fire stages, only three projects ripened into actual proposals. A58 to A-62.

The agency's decision to proceed with time-sensitive proposals, such as roadside hazard tree removal and the Big Tower sales, and to delay other, less urgent proposals is not contrary to NEPA. The opposite approach, in contrast, that the agency must convert all contemplated actions into proposals when it decides to proceed with some of the projects, is contrary to NEPA and this Court's holding in Kleppe. The actions cited by the Court of Appeals were

either categorically excluded from NEPA or were only contemplated actions. The district court correctly concluded that the Forest Service had a rational basis for moving forward with concrete proposals to harvest dead trees and the most intensively-burned areas.[2] A-34, A-58 to A-62. There were no proposed actions for the less severely burned areas, although the Forest Service contemplated eventual action in those areas. The Forest Service assessed the cumulative effects of both proposed and contemplated actions. A-73 to A-83. If contemplated actions ripen into proposals, their cumulative effects can be considered in greater detail.

Under its new standard, the Ninth Circuit requires that all contemplated actions for a similar geographic area be developed into proposals. Realistically, however, the Forest Service cannot do everything simultaneously. NEPA does not mandate that result, and the fact that a fire burned 50,000 acres does not change the law.

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[2] Respondent Blue Mountains incorrectly states that the only trees that survived the fire were scheduled for harvest. Blue Mountains Resp. Br. at 1-2. In fact, the only areas scheduled for harvest were where 90% of the trees did not survive the fire. A-24, A-35.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition for Writ of Certiorari.

Respectively submitted,

Michael E. Haglund
Counsel of Record

Scott W. Horngren
Julie A. Weis
Haglund, Kirtley, Kelley
& Horngren, LLP
101 SW Main Street
Suite 1800
Portland, OR 97204
(503) 225-0777

Counsel for Petitioners

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